UNIVERSITY OF PENNSYLVANIA

COMMERCIAL ARBITRATION IN PENNSYLVANIA

JOHN R. ABERSOLD

A DISSERTATION

IN POLITICAL SCIENCE

PRESENTED TO THE FACULTY OF THE GRADUATE SCHOOL IN
PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR
THE DEGREE OF DOCTOR OF PHILOSOPHY

PHILADELPHIA

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INTRODUCTION

In recent years there has been considerable criticism of litigation as a desirable method for the settlement of commercial disputes. The main objections raised are that, it is too expensive; too much time is consumed before a dispute can be settled; legal technicalities frequently prevent a decision on the merits; lay juries are not competent to render expert adjudication of the facts, especially when they are technical. It is not the purpose of this thesis critically to analyze the many phases of litigation. It has many defenders as well as many critics.

The outstanding criticism of litigation seems to be that entirely too much time is consumed in obtaining a settlement of a matter in dispute. This assertion has been made so many times that the writer determined to ascertain its validity as a preliminary step to a study of commercial arbitration. Information for this purpose was obtained from the prothonotaries of the various counties and a personal investigation of the dockets in certain counties was made by the writer himself. The information was obtained from dockets of the common pleas courts. The investigation was confined to actions in *assumpsit*, i. e., actions based on breach of contract, because the subject matter in such actions corresponds with the subject matter generally submitted to arbitration. Information was obtained from fifty counties throughout the State of Pennsylvania.[1]

It was found that in twenty-three counties the time consumed in assumpsit actions averaged over ten months, while in twenty-seven counties the time involved was less than ten months. In nine of the counties, at least eighteen months elapsed before a judgment was rendered. In four counties, twenty-four months is the average time involved.

The time involved in reaching judgment in contract cases is due to several outstanding causes. First, the courts were so congested with cases that the trial lists were many months in arrears. For instance, in Allegheny County, if a case were entered today and all efforts were made to reach an early decision, the case would

1. For list of counties and period involved in each see Appendix I.

not reach its turn for trial until fourteen months had elapsed. In Erie County, the trial list was reported to be eighteen months behind. In Philadelphia County, a litigant may get a case, started today, to trial in from three to twelve months. The variation depends solely upon the court to which the case is assigned. The trial list of Common Pleas No. 1 is ten months behind; of Common Pleas No. 2 is three months; of Common Pleas No. 3 is twelve months; of Common Pleas No. 4 is twelve months; and of Common Pleas No. 5 is twelve months behind. Fortunately in many counties throughout the state the trial list of the county courts are only six months or less behind the current cases entered.

A second cause for delays of this type is the number of postponements which are granted at the request of attorneys. In some cases, there are proper grounds for these requests; in others there are no adequate reasons. The writer has gathered considerable evidence to the effect that courts have been unduly liberal in their grants of postponements.

That there are delays in litigation is evident. The extent of delay depends largely upon the number of cases presented to the courts for judicial determination. Each court can only do a limited amount of trial work. If there are more cases in a year than the court can actually try, the cases not reached must await their turn for trial in succeeding terms.

There are more cases awaiting trial in the more densely populated urban counties than there are in the more sparsely populated rural counties. In the former there is more business activity, and therefore more disputes are likely to occur. In such counties of Pennsylvania, the average length of time necessary for the litigation of contract cases is between twelve and eighteen months, while in the more sparsely populated rural communities, eight to ten months is required. Apparently there is no relief in sight. Furthermore, if the number of cases presented for trial each year continues to increase as it has in the past twenty-five years, the outlook for the future suggests the probability of an increase in the time required for a final disposition of disputes adjusted by litigation.

There is only one type of person who benefits from the delays of litigation, that is, the defendant who is endeavoring to defeat

or compromise a just debt. Many business men today prefer to settle a disputed claim for a portion of the amount which they actually know to be due than to carry the account on their books for a long period of time. The writer has been informed by many reputable business men that they are frequently compelled to grant unwarranted concessions because of the prohibitive delays involved in litigation.

Those who feel that litigation is an unsatisfactory method of settling commercial controversies realize that some orderly method of adjustments is imperative. Conciliation, mediation and commercial arbitration are the most frequently suggested alternatives. It is with commercial arbitration alone that this thesis is concerned.

One may well inquire whether an alternative method of adjustment of disputes, such as commercial arbitration, would be necessary if the courts were able to reorganize and to reform their procedure in such a way as to effectively and expeditiously handle litigation. Would it be necessary to resort to an extra-judicial method if the time involved were reduced so that a period of only a month or two would elapse before a controversy could be tried in court? It seems clear that if these things were done it would materially reduce the expediency of devising other means of adjusting business controversies. However, there is one aspect of commercial arbitration which would not be met.

Commercial arbitration affords expert adjudication of the facts involved in a dispute. This results from the ability of the parties to select persons to adjust the controversy who are well versed in the subject matter and the trade customs involved. No such opportunity is afforded to the parties in litigation. Conceivably the courts could provide this feature, but there does not seem to be any reasonable probability of this.

In 1926 the writer first became interested in commercial arbitration. At that time a survey was made to determine the extent to which arbitration might be used to adjust business controversies. Commercial cases in litigation were deemed to offer an opportunity to determine the types of controversies involved and their suitability for adjustment by arbitration. *Assumpsit* actions seemed to afford

the most logical type of action to study since they are brought to determine disputes arising out of breach of contract. Three hundred *assumpsit* actions were selected at random from the appearance docket. In each of these cases the statement of claim and the affidavit of defense was obtained and studied. It was found that in approximately 65% of these cases the nature of the controversy was such that the final determination of the case would depend upon the adjudication of the facts involved. It is not maintained that only questions of fact were involved in this percentage of cases, but that the legal points involved were so elementary as to be known to the average business man. In every case that comes before the courts some question of law is involved. In some it is quite complicated; in others it is comparatively simple. Only cases in which the legal principles involved were common-place and in which the questions of fact were the controlling issue were placed in the group deemed suitable for arbitration.

The writer was impressed with the fact that a large percentage of this type of commercial dispute find their way into litigation. They are thereby determined by a lay jury, selected without regard to their knowledge of the subject matter of the disputes or of their familiarity with trade customs involved.

The subject of this thesis was selected in order that a study might be made of commercial arbitration as an alternative method for the adjudication of commercial controversies in the State of Pennsylvania. To accomplish this purpose it is desirable to ascertain: first, the facilities available for arbitration in the State of Pennsylvania; second, the extent to which these facilities have been used; third, the changes which are necessary to improve these facilities; and fourth, the advantages and disadvantages of commercial arbitration.

The facilities available for commercial arbitration may be divided into two groups: first, those provided by law; second, those offered by trade associations and exchange throughout the State.

In connection with the facilities provided by law, it may be said that there has been much uncertainty in the past concerning the legal status of agreements to arbitrate in this State. One desiring

information upon this question encounters many court decisions of a conflicting nature, as well as a number of statutory provisions, which have been enacted without apparent regard to their effect upon either the common law or prior statutory arbitration law. The writer has long been interested in this question and is convinced that this study would not be complete without a careful analysis of the more important court decisions and legislative enactments upon the subject of arbitration. In this connection particular attention is given to the Uniform Arbitration Act of 1927 and its effect upon the prior statutory law and upon the common law concerning arbitration.

In regard to the facilities for arbitration provided by trade associations and exchanges an analysis is presented of the functions of forty trade organizations concerning these matters. Nineteen different phases of the arbitration system of each of these organizations is analyzed and the outstanding examples of each phase are compared.

Commercial arbitration is recognized as of great importance in the adjustment of commercial controversies in England. In this connection Samuel Rosenbaum, in his treatise, Commercial Arbitration in England,[2] makes the following significant statements:

"Efficient though the English courts are in disposing of all but 3% of their great volume of business without letting it come to trial, there is a large mass of disputes in mercantile and other matters that is never brought into duly constituted courts of law at all. These disputes, instead of forming the basis of lawsuits, are, for a variety of causes, and in a variety of modes, submitted to arbitration, and there has grown up in England a law, practice and custom of arbitration, which is daily growing in bulk and authority and may almost be said to amount to a system of jurisprudence in itself. Just as the characteristic legislative impulse today in America is to create administrative tribunals, for the decision of questions arising out of our new industrial legislation, so the characteristic tendency in English legal procedure is likewise away from the courts, but towards 'domestic' tribunals whose awards in arbitration are sought after more than the judgments of our courts."

In New York there has also been a considerable increase in the use of arbitration in the last ten years. The activities of the American Arbitration Association, located in New York City, are responsible in some measure for the increased use of arbitration in that State.

2. American Judicature Society Bulletin XII (1916), p. 11.

To a limited extent the writer has drawn from experiences of other states and counties in arbitration matters. Some of the systems, methods, and facilities for arbitration in England and New York have been studied and comparisons made with those in operation in Pennsylvania. Considerable material, concerning arbitration in New York and England, as well as, assistance in obtaining a well-rounded view of the subject has been made possible by the cooperation of the American Arbitration Association.

In a few industries, in recent times, a new form of settling disputes has come into existence. This system may best be described as a dictatorship. To a slight extent dictatorships resemble a system of compulsory arbitration. The methods employed by industrial dictators will be briefly surveyed and contrasted with the practice of commercial arbitration.

Suggestions are made in the thesis as to methods by which the use of commercial arbitration may be stimulated in the State of Pennsylvania. Recommendations are also made concerning the types of disputes which appear to be most suitable for commercial arbitration and those which are best handled by litigation. The circumstances under which a system of business dictatorships appears desirable is also discussed.

Commercial Arbitration Defined and Distinguished.

Commercial arbitration is an *extra-judicial* method by which the parties to a *business controversy* mutually agree to submit their differences to arbitrators for adjustment. This form of procedure has been termed *commercial arbitration* to distinguish it from other types of arbitration, as well as, kindred methods employed for adjusting disputes.

Commercial arbitration must be distinguished from *industrial* and *international arbitration*. *Industrial arbitration* seeks to settle disputes, arising between *employer* and *employee*, out of conditions of employment, hours of labor, wages, the right to employ non-union labor and many other causes. *International arbitration* is employed as a means of obtaining a peaceful settlement of disputes of a *political nature* arising between nations, as for example, a dispute over a boundary line.

In *commercial arbitration* the dispute generally arises out of a breach of a *commercial contract.* Such questions as the quality or quantity of goods delivered, a failure to deliver, cancellations, and every conceivable phase of the contract which might give rise to a dispute is the subject for this type of procedure.

Litigation, Mediation and Conciliation Distinguished.

The distinction between litigation and arbitration requires little further comment. It has been pointed out that *arbitration* is an alternative to litigation and that it is used for the purpose of avoiding legal formality and to obtain an adjudication by experts in the field in which the controversy has arisen. The methods by which courts operate is familiar; the methods of arbitration will be described hereafter.

Mediation, generally speaking, refers to the intervention of a third party, who attempts to reconcile contesting parties to a dispute. He may either intervene in his own behalf or his services may be sought by either of the parties. Where the mediator succeeds in gaining a settlement, it is usually accomplished by bargaining with each party individually, until a point has been reached where each agrees to give or take a certain amount.

Mediation differs from commercial arbitration in many ways. First, it generally aims at a compromise, whereas commercial arbitration aims to decide a dispute upon its merits. Second, the mediator generally is not appointed by both parties, whereas, the arbitrators must be selected by the mutual consent of the parties. Third, a mediator generally bargains with each party separately, whereas, an arbitrator is not permitted to discuss the case with either party in the absence of the other. Arbitration, therefore, does not depend upon the bargaining power of the arbitrators. Fourth, in mediation, there is no necessity for a formal hearing of the parties, whereas, in arbitration there must be a hearing, with the opportunity for both parties to be present.

Conciliation, as it is generally used, does not refer to a specific method of settlement of disputes. It implies, however, an agency which attempts to placate the feelings of the parties, and remove

the feeling of ill-will and bitterness, so often existing between parties to a controversy. Its most frequent use is by a judge in a case being tried before him, where he suggests to the opposing counsel that they adjust the matter amicably, whereupon, the attorneys attempt to effect a settlement. The result is generally a compromise. In this respect conciliation is quite similar to mediation, whereas arbitration aims to adjudicate a dispute upon its merits.

Having distinguished commercial arbitration from other methods of amicable adjustment, it is now necessary to understand clearly the terms commonly used in reference to this subject. Loose terminology has frequently led to a confusion of meaning between voluntary and compulsory arbitration. These terms must be precisely defined.

Compulsory and Voluntary Arbitration Distinguished.

Commercial arbitration has been defined as an extra-judicial method by which the parties to a business controversy mutually agree to submit their differences to arbitrators for adjustment. Therefore, strictly speaking, a system which permits one party to compel his adversary to arbitrate, when there is no present or previous agreement to arbitrate, does not fall within the definition. However, by long and continued usage this method has been commonly referred to as compulsory arbitration and so long as its character is known and clearly understood there is no harm in referring to it as such. This form of arbitration, although rare, does exist.

To distinguish compulsory arbitration from forms in which mutual consent of the parties is present, the latter will be referred to as voluntary commercial arbitration. When it is evident that any one of the following situations exist the parties may be considered bound to voluntary arbitration. First, a dispute having arisen out of the terms of a contract, the parties agree to arbitrate it. Second, where the parties provide in a contract for arbitration of any dispute that may arise thereunder. Third, where by the acceptance of membership in a trade body, a party agrees to the rules and regulation of the organization, which provides that all members must submit any trade dispute with a fellow member to

the proper arbitral tribunal. In all three of these instances the arbitration is considered voluntary, even though legal process may be required to compel one of the parties to perform the arbitration agreement.

In-as-much as arbitration ordinarily connotates the notion of mutual consent care will be taken hereafter in dealing with the subject of compulsory arbitration to label it as such. Accordingly, where the terms *arbitration* or *commercial arbitration* are used it should be understood that the reference is to the voluntary type.

A Typical Arbitration Case.

An illustration of a typical case of commercial arbitration and the various steps that usually accompany such procedure is appropriate. The following case was one brought before the Arbitral Tribunal of the American Arbitration Association, and is typical of other cases settled by this method.

A, a manufacturer of men's clothing entered into a written contract with *B*, a manufacturer of woolen cloth. The terms of the agreement specified that *B* was to deliver to *A* 300 bolts of woolen fabrics of certain designs within a given period of time. The contract contained a clause which provided that in the event that a dispute should arise out of the terms of the contract, both parties agreed to submit the same to *X*, *Y*, and *Z*, as arbitrators.

A, received the fabrics within the time specified in the contract. He began cutting the material for the purposes of his business. After cutting some of the cloth he found that a certain amount of it was streaked and that many of the cuttings had to be discarded. *B* billed *A* for the full shipment of the material. *A*, demanded that the cost of the cloth represented by the cuttings in which streaks appeared be deducted from the bill. He also claimed that an allowance be made to him for the labor cost expended in making the streaked cuttings. *B* sent his inspector to *A's* plant and he reported that the cloth was not noticeably streaked. *B* therefore refused to accept a return of the cuttings and also refused to make a deduction from the bill. *A* refused to pay the bill. The parties had therefore reached an *impasse.*

Both parties were willing to submit the dispute to arbitration, as provided in the contract. Accordingly *B* notified the arbitrators. These men, it will be remembered, were specified in the contract. The arbitrators, having been notified, determined that a hearing of the matter should be held on a certain day. They notified both parties of the date set for the hearing.

On the specified date the parties appeared, presented their evidence, proper samples of the alleged damaged goods, as well as, evidence of the amount damaged and the amount of labor expended in cutting the streaked portion. After all the evidence had been presented the arbitrators retired and deliberated. They found that the goods were streaked and decided for *A*, the defendant, allowing him to return the defective fabric, and also ordered the plaintiff to pay a certain sum to *A* as damages for the labor cost incurred by him. The award having been rendered, the arbitrators submitted signed copies of it to the parties. It so happened in this case that *B* paid the amount specified and the matter was ended. If the award had not been complied with the successful party would have been obliged to take whatever steps were available to enforce the award.

This very brief description will suffice to illustrate not only the type of dispute that is suitable for arbitration, but also, the main steps in the procedure. It should be noted that in this illustration no obstacles were interposed in course of the procedure by either of the parties. There are, however, many obstacles which possibly may arise but a later portion of the thesis will deal with them more fully.

Definitions.

Various terms used in the practice of commercial arbitration have been indicated. A recapitulation of these terms is advisable. The *agreement to arbitrate* is an agreement by which the parties mutually consent to submit a controversy to arbitrators for adjustment. It is the starting point in every voluntary arbitration. It may be entered into either before, or after the dispute has arisen. Where the agreement provides for the adjustment of a future dispute by arbitration it generally takes the form of an *arbitration*

clause which the parties insert in their contract. In the event that the parties have not agreed to arbitrate prior to the occurrence of the dispute but do so after it has arisen the agreement is termed a *submission.* The persons to whom the parties submit the controversy for adjustment are known as *arbitrators.* Where the arbitrators cannot reach a decision they may call in an additional party, known as an *umpire* to determine the matter. The occasion provided on which the parties may present evidence to the arbitrators is known as the *hearing.* The decision of the arbitrators based upon the evidence presented at the hearing constitutes the *award.*

CHAPTER I

The Origin of Commercial Arbitration and Its Development in England

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CHAPTER I

The Origin of Commercial Arbitration And Its Development in England

Origin in Early Times.

Arbitration is by no means of recent origin. Evidences of its existence and use are found in writings many hundreds of years before Christ. Early Greece was familiar with its use, as is evidenced by the following quotation from Aristotle's "Rhetoric and Poetic:"

"A wish to proceed to arbitration, rather than to judicial decision, for the arbitrator looks to what is equitable, the judge to what is law; and in order to do this it was that arbitration was introduced, in order, namely, that equity might prevail."[1]

H. Bentivitch, writing in the "Law Times"[2] in 1893, states that during the whole existence of the Hebrew state in Biblical times "and even later on, during the period of exile, a system of arbitration was the sole mode adopted for the settlement of private disputes . . . It was indeed a maxim that no man should be encouraged or assisted to litigate . . . In the older Roman law there was no complete remedy for non-performance of the award, unless the parties bound themselves reciprocally either to perform what should be awarded or to incur the forfeiture of a sum of money or of some other specific thing. This, however, was remedied by Justinian, who enacted that—whether the submission was under a penalty or not, there should be no appeal after a lapse of ten days from the judgment, and each party should then have a remedy against the other based on the judgment in case of non-performance. And the same emperor enacted that, where the submission was accompanied by an oath to stand to the award; or the arbitrator by the consent of the parties, bound himself by an oath to end the dispute with all regard to truth, both parties should be absolutely bound."

1. Book I, Chap. 13.
2. Vol. 95, pp. 524-528 (Oct. 14, 1893).

From these early beginnings commercial arbitration may be traced through various European and Asiatic nations down to the present time. For the purpose of this thesis, however, it is only important to trace the development of this system of procedure in England. A proper understanding of the English growth and development of commercial arbitration is necessary in order to appreciate the problems that are presented in connection with this method of settlement in the State of Pennsylvania.

The Early Fairs and Markets in England.

Commercial arbitration apparently had its inception in England in the early fairs and markets. These were of two types of fairs: one was held yearly, which attracted more or less national attendance, while others were held more frequently and were local in character. The most important yearly fair was held at Stourbridge, and continued for three weeks. This fair occupied about half a mile square which was divided into streets, in each one of which a special article was traded—such as cloth, leather, wool, glass and iron. Merchants from all of the leading nations displayed goods for which their own country was particularly noted,[3] and many of these merchants traveled from fair to fair.

Disputes between merchants and buyers were bound to arise at these fairs and because of the itinerant nature of the fairs, it became highly important that such disputes be settled on the spot. The sessions of the law courts were both infrequent and irregular. The merchants, finding that the transient character of their trade prevented them from employing the law courts to settle disputes, devised a scheme of referring their controversies to the determination of certain of their fellow traders. They became convinced that this method was not only speedy but also inexpensive. Furthermore, since their fellow traders were experts in the business, the disputes were settled even more equitably by this method than by the procedure in the regular courts. These tribunals composed of trade associates were called Courts of "Pie Poudre" which was an English mispronunciation of the French words "pied poudre," or "dusty foot." The court was so called

3. Birdseye, C. F., Arbitration and Business Ethics, p. 24.

because of the promptitude of its action. Men might come to it just as they were without even stopping to brush the dust from their shoes.[4]

The Decision in Vynior's Case.

With the expansion of English Commerce, the popularity of arbitration increased. With its extended use there arose the question of the power of one party to revoke his agreement to submit a dispute to the arbitrators. This problem was presented in England in 1609 in the celebrated *Vynior's Case.*[5] This case is of great importance, as it became the basis for the common law in England on the subject of revocability of agreements to arbitrate, and its influence predominated until overthrown in 1855 by the House of Lords in *Scott v. Avery.*[6] Not only has *Vynior's Case* been of extreme importance in the English arbitration law, but it also became the basis for the common law on the subject in Pennsylvania—and generally throughout the United States.

A thorough understanding of this case and its effect is only made possible by a very scholarly and scientific treatise upon the subject by the Honorable Julius Henry Cohen in his work, "Commercial Arbitration and the Law." This treatise is an exhaustive study of the common law of England on the subject of arbitration and has done much to explain the reason for the judicial attitude adopted in both England and the United States toward arbitration.

A brief summary of the case shows that Robert Vynior and William Wilde had entered into an agreement to arbitrate a dispute which had arisen between them. They had specified in their agreement that William Rugge was to act as the arbitrator. Having made the agreement, they then entered into a bond whereby William Wilde bound himself to abide by the award of the arbitrator. After the agreement had been entered into, Wilde revoked the authority of the arbitrator and refused to make good on the bond when called upon. He defended on the ground that, since the arbitrator had not rendered an award, there existed no obligation on his part. Suit was thereupon instituted by Vynior upon the bond.

4. Cheyney, E. P., A Short History of England, p. 200.
5. Trinity Term, 7 Jac. 1 (Eng.).
6. 5 H. L. C. 811, 25 L. J. (Exch.) 308 (Eng.).

Lord Coke presided at the trial and rendered a judgment for Vynior. The court reasoned that, since Wilde had precluded the making of the award, he had breached the agreement and therefore should be liable on the bond. It should be noted that there was no rule or public policy against enforcing penalties at that time. Cohen points out that, had Lord Coke stopped at this point, no harm would have occurred, but he went further and made additional statements which were but dicta.

The Obiter Dictum in Vynior's Case Reported as the Law. The additional statements made by Lord Coke have been erroneously reported as the decision in *Vynior's Case* and have been followed as the law.[7] The dictum causing the subsequent difficulties is that "A man cannot by his act make such authority, power or warrant not countermandable which is by the law and of its own nature countermandable." Cohen clearly shows that an examination of the original reports of the case in Statham's *Abridgment* and Bracton's *Notes* demonstrates the facts that revocability of the agreement to arbitrate was not in issue, and that the incorrect report found in Brooke's *Abridgment* has been taken as the law. No better illustration can be found of the danger "that a mere *obiter dictum* by process of repetition becomes a doctrine of the law."[8] The following statement is also of significance: "Can anyone now believe that, if the early cases in Bracton and those cited in Statham had been accessible to the Bar and to the Bench of those times—as our early New York decisions are to us, this error in legal reasoning would have so long thrived and bred its fertile and hardy brood of dwarfs? Surely the common charm of *Vynior's Case* is due to its having been 'fathered' on a grave and reverend judge thus beguiling and bedazzling even 'the learned'."[9]

The *obiter dictum* in *Vynior's Case* is also interesting because of its subsequent application by the courts in holding that the appointment of arbitrators was analogous to the appointment by a principal of his agent. The courts held that, since a principal had the power to terminate the authority of his agent to deal with a

7. Cohen, J. H., Commercial Arbitration and the Law, pp. 92 et seq.
8. Cohen, J. H., Commercial Arbitration and the Law, pp. 146.
9. Ibid., p. 127.

third party—even though the principal might be liable for damages to the agent, so a party to an arbitration had the power to revoke the authority of the arbitrator whom he had appointed. There are several fallacies in this sort of reasoning. First, it is based upon a misconception of the *purpose of arbitration.* An arbitrator is appointed to decide a dispute upon its merits—not to champion the cause of the party appointing him. Once appointed, he is duty bound to protect the rights of both parties and to return an award on the merits of the case. He therefore *cannot be held to be an agent.* Second, even though fallaciously considered to be an agent, his appointment is by the agreement of both parties and therefore, once appointed, cannot be discharged without the approval of both. To illustrate, suppose A and B agree to appoint C as arbitrator. Does this mutual agreement give either party the right to revoke without the consent of the other? Certainly not under any accepted theory of either the law of agency or the law of contracts. Third, assuming that the arbitrator is an agent of the party appointing him, is not the *agency coupled with an interest* and therefore *irrevocable?* It would seem that the moment that the appointment has been made, the arbitrator has an *interest* in the subject matter of the dispute, i. e., to see that the rights of both parties are properly guarded. If his *agency is coupled with an interest,* then by the established principles of the law of agency his authority cannot be revoked. Many years passed, however, before the fallacy in *Vynior's Case* was blasted by the English judges.

Another bogey, however, grew out of the *obiter dictum* in *Vynior's Case.* It took the form of a doctrine that parties to a controversy could not *oust the courts of their jurisdiction.* It was felt that an agreement to arbitrate should be revocable, thus giving either party the right to resort to the courts of law, else the rights of the parties might not be properly guarded. In other words, the parties must be protected against their own acts and the jurisdiction of the courts must be kept sacred. Cohen, in his able treatise,[10] refers to the following statement of Lord Campbell's opinion in the House of Lords, which throws considerable light upon the subject:

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10. Cohen, J. H., Commercial Arbitration and the Law, pp. 254-255. Also see p. 153, et seq.

"The Doctrine (of ousting the courts of their jurisdiction) had its origin in the interests of the Judges. There was no disguising the fact that, as formerly, the emoluments of the Judges depended mainly, or almost entirely, upon fees, and as they had no fixed salary—there was great competition to get as much as possible of litigation into Westminster Hall, and a great scramble took place in Westminster Hall for the division of the spoil. And, hence, the dispute between the different courts about a latitat, a capias, and a quo minus, the latitat bringing business into a 'Court of Queen's Bench, the capias into the Court of Common Pleas, and the quo minus into the Court of Exchequer, and they had great jealousy of arbitrations whereby Westminster Hall was robbed of those cases which came not into the King's Bench nor the Common Pleas, nor the Exchequer. Therefore, they said that the courts ought not to be ousted of their jurisdiction, and that it was contrary to the policy of the law to do so."[11]

There was considerable confusion in the English common law concerning the right to revoke submissions to arbitration. A practice grew up whereby provision was made in the contract, that in the event that a dispute arose out of any part of the contract, the parties agreed to submit the same to arbitration and that no action at law should be maintained until the arbitration had been concluded. This became known as an agreement to arbitrate as a condition precedent. It was out of such an agreement that the case of *Scott v. Avery*[12] arose. This case is of considerable importance in the common law of arbitration in England and will therefore be briefly discussed.

The Case of Scott v. Avery and its Effect upon the Common Law of Arbitration in England.

This is a case in which a clause in an insurance policy provided that in the event of a dispute arising out of a policy of insurance, the parties agreed that the amount of the loss should be determined by arbitrators and that no action at law should be maintained until the arbitration had been determined. The case was finally decided in the House of Lords and may be said to be the ruling case on the common law of arbitration in England. Lord Campbell in his decision upheld the agreement to arbitrate and refused to permit an action at law by the insured until he had submitted the dis-

11. 25 L. J. (Exch.) 313 (Eng.).
12. 5 H. L. C. 811; 25 L. J. (Exch.) 308 (Eng.).

pute to the arbitrators and they had rendered an award. This decision clearly overruled the principles established by *Vynior's Case.* It should be noted however, that the court in *Scott v. Avery* was not unanimous in its decision. This caused some confusion, and there are a few decisions which followed the minority view.

Cases Subsequent to Scott v. Avery.

In 1894 the case of *Hamlyn & Company v. Talisker Distillery*[13] came before the House of Lords. This was a contract between an English and a Scotch firm containing this clause: "Should any dispute arise out of this contract, the same is to be settled by arbitration by two members of the London Corn Exchange, or their umpire in the usual way." After first deciding that the English law governed, the court then held that under the law of England such a clause was valid. The language used by Lord Watson is quite significant. He says:

"The jurisdiction of the court is not wholly ousted by such a contract. It deprives the court of jurisdiction to inquire into and decide the merits of the case, while it leaves the court free to entertain the suit and to pronounce a decree in confrmity with the award of the arbiter. Should the arbitration from any cause prove abortive, the full jurisdiction of the court will revive to the effect of enabling it to hear and determine the action upon its merits. When a binding reference is pleaded *in limine*, the proper course to take is either to refer the question in dispute to the arbiter named or to stay procedure until it has been settled by arbitration."

This decision may be said to close the argument. From this point on it became a settled rule in England that agreements to arbitrate are valid and irrevocable without mutual consent and that the courts will stay a suit at law until the arbitration has been determined. Furthermore, that the parties will be bound by the arbitral award unless it is clearly shown to be abortive.

The subject of commercial arbitration not only has received attention from the courts, but from Parliament as well. A short survey of the Acts of Parliament on the subject is appropriate.

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13. 21 Session Cases (4th Series) 21 (Eng.).

English Arbitration Statutes.

As early as 1697 Parliament dealt with commercial arbitration in the form of a statute[14] which provided that upon proof by means of an affidavit, a submission which had been agreed to be made a rule of court could be entered of record in such court. This having been done by either of the parties, the court was authorized to order a rule that the parties should submit to and be bound by the arbitration. If either party refused to proceed with the arbitration, he placed himself in contempt of a rule of court. The statute further provided that process for contempt was to issue from such court, and was not to be stopped or delayed in its execution by an order of any court unless it should be made to appear, on oath, to such court that the arbitrators or umpire had misbehaved themselves, or that such award, arbitration, or umpire, was procured by "corruption or other undue means." In other words, where the parties agreed to make their submission a rule of court, and entered it with the court as such, the court was authorized to bring contempt proceedings against the party who refused to arbitrate, except where it could be proved that fraud or corruption was present.

The interpretation of this statute by the courts in England may be ascertained from the following statement of Russell:

"It would appear probable that it was the intention of the English Legislature, by this statute, to give that conclusive efficacy to procedure before an arbiter, without which there is scarcely any appreciable benefit derivable from it. This may be plausibly inferred both from the words of the statute and from some of the earlier decisions pronounced under it. But however this may be, the statute has not been so applied by the courts of law in England, which have held themselves at liberty to set aside awards on other grounds than those enumerated in the statute."[15]

Nearly a century and a half later, in 1833, Parliament enacted another statute[16] which provided that the power of an arbitrator (if appointed by a rule of court in any action, or in pursuance of an agreement of the parties that the submission should be made a rule of court) was to be irrevocable by either party without the

14. 9 William III, C. 15.
15. Russell on Arbitration and Award, pp. 8 and 9.
16. 3 and 4 William IV, c. 42, s. 39.

leave of court. This statute showed more strongly the intention of the legislature to make agreements to arbitrate, which had been made a rule of court, irrevocable without leave of court. Of the effect of this statute, Russell says: "The courts of law have taken occasion to intimate that they will very sparingly exercise the discretionary power which is given to them of granting leave to revoke."[17]

By the Common Law Procedure Act[18] of 1854, Parliament provided that every submission in writing might be entered as a rule of court (whether or not provision was made in it for making it such) unless there was a contrary intention shown. It is interesting to note that this statute eliminated the necessity for the parties to specify that the submission be made a rule of court. It permitted the submission to be entered as a rule of court so long as no intent to the contrary was expressed.

English Arbitration Statutes Codified. It is important to note that the legislative enactments in England, stretching over a period of a decade and a half, have gradually adopted a more liberal and sympathetic attitude toward enforcibility of arbitration agreements. These Parliamentary acts were codified and liberalized further in the Arbitration Act of 1889.[19] This statute is today the recognized law on commercial arbitration in England and may well be said to contain the fundamental features, which have since been adopted in some of our own State statutes. It is not necessary to deal at length with the provisions of this statute; a brief summary of its main provisions will suffice. The opening section of the Act states:

> "A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the court or a judge; and shall have the same effect as if it had been made an order of court."

As a result of this section, a person who has agreed to arbitrate is bound to arbitrate. He can revoke neither his submission nor his appointment of the arbitrators, without leave of court. Leave of court will only be granted where an arbitrator has been guilty of

17. Russell on Arbitration and Award, pp. 8 and 9.
18. Sec. 17.
19. 52 and 53 Vict. ch. 49.

misconduct, or where an arbitration or award has been improperly procured.[20]

A distinctive feature of this Act lies in the rights provided for a party to a submission, who desires to arbitrate though his opponent refuses. Where the party refusing to arbitrate starts an action at law, his opponent may demand a stay of the legal proceedings.[21] Or where either party attempts to block the arbitration by a refusal to appoint the arbitrators, the other party may serve notice demanding the appointment of the arbiters; and if the appointment is not made within seven days, then the arbiters will be appointed by the court or by the party desiring the arbitration, with the approval of the court.[22] Thus a method is provided by which one party to a submission can be prevented from blocking recourse to arbitration.

The award having been rendered, it may be enforced in the same manner as a judgment rendered in a civil suit.[23] Thus, the result is that an arbitration has the same binding force as a judgment rendered in a court of law, and similar means may be used to compel its enforcement.

There are two additional provisions of the Act which should also be noted. The one provides that, unless the submission specifies otherwise, the arbitrators shall have the right to state an award concerning one or more points of law — in the form of a special case for the opinion of the court.[24] Under this section as it has been construed, the arbitrator has absolute discretion whether he will give the courts the opportunity of deciding any or all of the questions of law which arise in the course of the dispute. The other provision specifies that at any stage of the proceedings under a reference, the arbitrator may state (in the form of a special case) any question of law for the opinion of the court, and, furthermore, that the court at its discretion may compel him to submit certain questions of law in the form of a special

20. Sec. 11.
21. Sec. 4.
22. Secs. 5 and 6.
23. Sec. 14.
24. Sec. 7 (b).

case.[25] The apparent distinction is that the arbitrators, on their own initiative, may formulate a special case for the court's determination during the hearing stage; but if a demand is made by either of the parties for a stated case and is refused by the arbitrators, the party desiring the case stated may petition the court, and, if the petition is granted, the court may order the hearings to cease until the stated case has been determined by the court and returned to the arbitrators. In the latter instance, refusal on the part of the arbitrators to obey the order of the court amounts to misconduct, which is grounds for setting aside the award.[26]

The writer has been informed that an abusive practice has recently grown up in England whereby, for purposes of delay, parties to arbitrations have frequently requested cases to be stated. This practice, if it persists, constitutes an abuse which should be stamped out. An amendment of the Arbitration Act of 1889 may be necessary to accomplish results.

English Compulsory Arbitration Statutes. Parliament has of recent years made provision that proceedings under certain new acts shall be governed by arbitration instead of by recourse to the courts. In some cases the use of arbitration is optional, while in others it is mandatory. There is no necessity to go into detail concerning these acts. A mere illustration of one type will suffice. Under the Ranges Act of 1891, or under the Defense Act, where any land is acquired for military purposes, the person or authority acquiring the land may require that the compensation to be paid for the land be settled by arbitration, and not by reference to a jury. Likewise, where land is taken by public utilities under the power of eminent domain, arbitration is prescribed for determining the value of the land. Acts of a similar nature bear such titles as Markets and Fairs Clause Act, 1847; the Harbors and Docks Clause Act, 1847; the Towns Improvement Clause Act, 1847; the Cemeteries Clause Act, 1847; the Tramways Act, 1876; the Electric Lighting Act, 1882; the Small Holdings and Allotment Act, 1908; the Development and Road Improvement Funds Act, 1909, and

25. Sec. 19.
26. Bacon, R. S., Commercial Arbitration as Governed by the Law of England, p. 89.

others. Under these Acts, arbitrations take place in great numbers every year all over the Kingdom, as practically every condemnation proceeds in this way.[27]

The Commercial Court.

An interesting development of arbitration facilities has grown up in England in a form popularly known as the Commercial Court. In 1895 the Judges of the King's Bench Division of the High Court created a special trial list, to which were to be assigned certain classes of commercial cases. These cases were to be heard by a judge (or judges) selected by reason of his special experience in commercial matters. The cases were to be handled with the same speed, skill and disregard of legal technicalities as were recognized to be available in other types of arbitration. The following description by Rosenbaum[28] of the operation of this court is noteworthy:

"The first judge assigned to the List was one whose effort had been mainly responsible for its institution, Mr. Justice Mathew, 'a judge intolerant of technicalities, who believed that all he needed was to see the parties before him to decide their controversy.' Under his able management, the List was started under the most brilliant possible of auspices. 'He swept away written pleadings and technicalities of every sort, coming straight to the point of every dispute and bringing the court into high favor with the London merchants who needed it.' Since his time the List has varied in efficiency according to the Judge assigned to it, and there have been times when it was lower in the estimation of commercial solicitors than at others. On the whole, the List has succeeded in providing an exemplary and intelligent procedure for the cases transferred to it, and—in so far as it presents to the commercial world the possibility of a swift and simple adjudication of questions of legal importance by the regular judges of the land, it may be said to have achieved the object for which it was created. But it has by no means satisfied the original motive which led to its creation, which was to draw back to the High Court some appreciable portion of the business that was going to arbitration. Arbitrations continue to increase in volume from year to year and the volume of litigation in the High Court continues to decrease annually."

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27. Rosenbaum, S., Commercial Arbitration in England, American Judicature Society Bulletin XII, p. 33 (1916).
28. Ibid., pp. 49-50.

The London Court of Arbitration.

The London Court of Arbitration is an arbitral tribunal composed of twenty-four members,—two appointed and ten elected by the London Chamber of Commerce, and the Common Council of the Corporation of the City of London, respectively. It was created to provide a tribunal, similar to those established by various trade associations, to which persons not members of trade bodies could bring disputes for arbitration.

The more important functions of this body are:—first, it provides an excellent set of rules and regulations for the arbitration of commercial disputes; second, it recommends a clause for insertion in commercial contracts which will afford arbitration under its rules and regulations; third, it provides a list of arbitrators, consisting of experts in every important trade so that parties to an arbitration may be assured of obtaining the judgment of thoroughly competent authorities appointed by an impartial body; fourth, it recommends that parties desiring arbitration apply to it for the appointment of arbitrators,—thus insuring the selection of impartial arbiters. The London Court of Arbitration has a schedule of fees which are charged by arbitrators appointed under its auspices. This schedule has been carefully prepared with the joint object of affording reasonable emoluments to arbitrators and of protecting the parties concerned from unreasonable expense.

The London Court of Arbitration affords necessary facilities to those in England who do not belong to trade associations, but who desire a competent tribunal to supervise the arbitrament of their disputes. Because of the high standard of integrity of its membership it presents a reasonable guarantee to disputants—and especially to those not of British nationality—that the arbitrators who are appointed will be strictly impartial and fully competent to deal with the matters referred to them.

The speed with which appointments of arbitrators are made is significant. It is said that applications for the appointment of arbitrators are not infrequently received and determined within

twenty-four hours.[29] The fixing of an early date for trial follows, in the absence of reasonable ground to the contrary.

Although it had as members experts in the various trades and professions, its value to the commercial community in London was not generally recognized, but today the increasing number of contracts which contain the arbitration clause recommended by this Court testifies to its growing importance.[30] Its work is not confined to trades within the United Kingdom. Arbitrations under its auspices have been accepted by merchants in India, the United States, China, France, Spain, Switzerland, Portugal, Greece and Italy.[31]

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29. The Chamber of Commerce Journal, May 30, 1930 (Eng.).
30. The Liverpool Journal of Commerce, July 6, 1929 (Eng.).
31. The Statist, August 10, 1929 (Eng.).

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CHAPTER II

The Legal Phases of Commercial Arbitration in Pennsylvania Prior to 1927

In order to further the purpose of this thesis, it is necessary to present an adequate historical background of the development of arbitration in this State. It is not possible to merely look at the various phases of arbitration as it exists today and explain its present and prospective uses, nor to make recommendations for its future adoption — without first having clearly in mind its past history. A valuable part of its historical development is found in the treatment which it received by the courts, as well as by the Legislature.

Historical.

In 1927 the Legislature passed a statute with the intent to provide an effective system of arbitration for this State. It was also intended by this Act to bring the legal status of arbitration agreements in accord with a Uniform Arbitration Act which had been adopted by some of the leading commercial states. It is for this reason that this chapter is devoted to a study of the status of arbitration prior to 1927, as that date should mark a new era in the arbitration movement in this State.

This chapter may be divided into five main parts: (1) the status of arbitration under the common law prior to 1927; (2) the statutory provisions for voluntary arbitration; (3) the statutory provisions for voluntary arbitration of actions pending in a court of law; (4) the statutory provisions for the compulsory arbitration of actions pending in a court of law; (5) the obstacles to common law and statutory arbitrations in Pennsylvania prior to 1927.

It is not the purpose of the writer to discuss the many phases of arbitration which have been dealt with by the courts of this State. Such a study would constitute a volume in itself. There are three main phases of the subject, however, which should be

examined to ascertain their status under the common law. They are: (1) the validity of agreements to arbitrate; (2) the grounds upon which awards may be set aside; (3) the methods provided for the enforcement of awards. Before entering into a discussion of these three problems, it is interesting to ascertain if our early courts were influenced by the English law on arbitration.

The early arbitration decisions of the courts of Pennsylvania were influenced by the decisions of the English court. That the revocability of agreements to arbitrate was affected by the English decisions is clearly evidenced by the following statement in the case of *Power v. Power*:[1] "A submission, — whether by deed, parol, or rule of court, like any other naked authority, is countermandable before execution of it, though expressed to be irrevocable, *Vynior's Case* 8 Rep. 162." Not only were the courts of this state influenced by the English decisions on arbitration, but — far worse — they adopted the erroneous version of *Vynior's Case,* permitting either party to revoke the agreement to arbitrate.

With a beginning of this nature, little could be expected of the future decisions to correct the error. To state it mildly, there has been much confusion and conflict in the decisions of the courts of this State on the subject of arbitration. It might be well to remark, in passing, that much of the confusion has resulted from the comments of judges, in their opinions concerning the revocability of agreements to arbitrate, — when that point was not in issue in the case. Judges at a later date used the obiter dictum to decide this issue before them and cited such former decisions as having established the law upon the point. As a matter of fact, the right of a party to revoke the agreement to arbitrate was not strictly in issue in the case of *Power v. Power,* but the court made the above mentioned general statement, and many subsequent cases quote *Power v. Power* as the leading Pennsylvania case upon the subject. Many other illustrations might be given of decisions in which judges have clearly failed to differentiate obiter dictum from the decision on the point at issue in previous cases.

Agreements to arbitrate may be divided into two main groups.

1. 7 Watts 205 (Pa. 1838).

The first, — where the agreement is to arbitrate an existing dispute; the second, — where the agreement is to arbitrate a dispute which the parties realize may arise in the future.

The Status of Agreements to Arbitrate Existing Disputes.

The main object of interest in this type of agreement is the question of its enforceability. May such an agreement be revoked by either party, or is it irrevocable in the absence of mutual consent to revoke? Before answering this question, care should be taken to point out that it does not refer to the ability of either party to have an award set aside, when such award for any reason has been improperly rendered. It deals with the ability of either party to revoke the authority of the arbitrators, thus preventing a settlement of the dispute by the means provided in the arbitration agreement. In other words, it refers to the right of either party to nullify the agreement to arbitrate, even though the other party insists upon its fulfillment.

The forms which the revocation of the agreement to arbitrate may take are: (1) an attempt upon the part of either party to maintain an action in a court of law upon a dispute which it has been agreed shall be settled by arbitration; (2) an attempt to revoke by giving notice to the other party of a refusal to arbitrate, either before or after the appointment of the arbitrators; (3) by a refusal to name the arbitrators, when the arbitration agreement specifies the right of the parties to make the selection.

The attempt to revoke may either be prior to the rendition of the award by the arbitrators or subsequent thereto. The cases will therefore be divided into two groups,—the first, those in which the revocation was attempted prior to the award; and the second, where the revocation took place subsequent to the award.

In the first group there are no cases which have arisen squarely upon the point. There are, however, some general statements which indicate that either party may revoke his submission at any time prior to the rendition of the award. Thus, in *Gray v. Wilson*,[2] it

2. 4 Watts 39 (Pa. 1835).

is said: "Even a nomination of an arbitrator, under a submission of existing controversies, may be revoked; and, though the party may forfeit his bond, the jurisdiction of the courts remains." In *Power v. Power*[3] the following statement appears: "A submission, whether by deed, parol, or rule of court, like any other naked authority, is countermandable before execution of it, though expressed to be irrevocable." The court, in the case of *Snodgrass v. Gavit*,[4] twenty years later, with the issue more squarely before it, said: "Where parties stipulate that disputes, whether actual or prospective, shall be submitted to the arbitrament of a particular individual or tribunal, they are bound by their contract and cannot seek redress elsewhere." According to the latter decision, the test is whether the arbitrators have been named in the agreement to arbitrate. Apparently, if they have been designated, the agreement cannot be revoked. This view is more consistent with later decisions of the courts where the question of the revocability of agreements to arbitrate future disputes have been considered.[5]

There is a class of cases, however, in which the agreement to arbitrate has been unequivocably held irrevocable by either party prior to the rendition of the award. The cases referred to are those where a pending action in court has been discontinued by the mutual consent of the parties, and the same has been submitted to arbitrators chosen by the parties. In these cases the courts have based their decisions upon the "change of position" of the parties, and have held that the submission is "a contract upon sufficient consideration" and not a "mere naked authority."[6]

In the second group of cases there is no conflict in the decisions concerning the status of an agreement to arbitrate an existing dispute after an award has been rendered. The parties having agreed to arbitrate, the arbitrators having been chosen, and a decision rendered after a review of the evidence, it is then too late for

3. 7 Watts 205 (Pa. 1838).
4. 28 Pa. 221 (1857).
5. Cf. infra p. 43 et seq.
6. White's Appeal, 108 Pa. 473 (1885); McKenna v. Lyle, 155 Pa. 599, 26 Atl. 777 (1893); Zehner v. Lehigh Coal, etc. Co., 187 Pa. 487, 41 Atl. 464 (1898); McCune v. Lytle, 197 Pa. 404, 47 Atl. 190 (1900); Johnson v Crawford, 212 Pa. 502, 508, 61 Atl. 1103-1104 (1905).

either party to revoke the submission.[7] The parties are then bound by the award, unless proper grounds are shown for setting it aside because of irregularities in its procurement.[8]

To sum up the law on revocability of agreements to arbitrate existing disputes, it may be said that they cannot be revoked after an award has been rendered, but apparently may be revoked prior to the award if the arbitrators are not named in the submission, except in cases where an action pending in court is, by agreement of the parties, to be submitted to arbitration. It is noteworthy that in very few cases the parties fail to name the arbitrators in their agreement to arbitrate an existing dispute.

The Status of Agreements to Arbitrate Future Disputes.

This type of agreement is generally found as a part of a contract entered into between parties for the purchase or sale of goods, or for work, labor and material, whereby the parties — realizing that a dispute may arise at a future date out of some portion of the contract, specify that such dispute shall be settled by arbitration. When such provision is made for the settlement of prospective disputes, methods are available for specifying by whom the dispute shall be settled. They are: (1) the arbitrators or the tribunal to arbitrate shall be definitely named; (2) the number of arbitrators may be specified, but their selection by the parties themselves left until after the dispute has arisen; (3) the number of arbitrators as well as their identity to be determined after a dispute has arisen; (4) the number of arbitrators specified but their identity to be agreed upon by the parties after the dispute has arisen, provision being made that for failure of one party to select the arbitrators when called upon to do so, such party thereby authorizes his opponent or some third person to make the selection for him.

Validity of Agreements. Having observed the different provisions for the future disputes by arbitration, attention will now be given to the validity of such agreements. Statements similar to the fol-

7. McGeehan v. Duffield, 5 Pa. 497 (1847); Robinson v. Bickley, 30 Pa. 384 (1858).
8. Shisler v. Keavy, 75 Pa. 79 (1874); McCune v. Lytle, supra n. 6.

lowing appear many times in reported cases in this State: "General clauses providing for the settlement, by arbitration, of disputes that may arise between the contracting parties do not take away the jurisdiction of the courts."[9] This shows clearly the influence of the English Common Law upon the legal reasoning of the judges of this State. Before such a statement may be clearly understood, one must ascertain the meaning of "general clauses."

General Clauses. It is apparent, from the decisions, that the courts have distinguished between agreements to arbitrate wherein the arbitrators or the arbitral tribunal has been designated, and those in which they have not. The term "general clauses" is applied to agreements to arbitrate future disputes in which the arbiters are not specifically named. Agreements providing for arbitration by such "general clauses" are revocable by either party before the award has been rendered.[10] In *Snodgras v. Gavit,*[11] the parties agreed that all disputes arising out of their contract should be submitted to three arbitrators, to be mutually chosen, whose decision should be final. This agreement was held to provide for arbitration by a "general clause," and therefore revocable. In *Phoenix Hosiery Company v. Griffin Smith,*[12] a provision in a future dispute clause, which authorized one party to appoint the arbitrators after notice and default by the other party, was held revocable. In *Gray v. Wilson,*[13] a provision in a future dispute clause authorizing a judge to appoint, in the event of default in appointment by either party, was held to be revocable.

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9. Gray v. Wilson, 4 Watts 39 (Pa. 1835).
10. Gray v. Wilson, 4 Watts 39 (Pa. 1835); Snodgrass v. Gavit, 28 Pa. 221 (1857); Page v. Van Kirk, 1 Brewster 282 (Pa. 1866); Phoenix Hosiery Co. v. Griffin Smith Co., 16 Phila. 568 (Pa. 1883); Wright v. Susquehanna Mutual Fire Insurance Co., 110 Pa. 29 (1885); McMahon v. The Waterman's Beneficial Assn., 17 Phila. 286 (Pa. 1885); Comm. Union Assurance Co. v. Hocking, 115 Pa. 407, 8 Atl. 589 (1887); Gowan v. Pierson, 166 Pa. 258, 31 Atl. 83 (1895); Boyle v. Insurance Co., 169 Pa. 349, 32 Atl. 553 (1895); Mozer v. Sun Insurance Company, 176, Pa. 579, 35 Atl. 221 (1896); Yost v. McKee, 179 Pa. 381, 36 Atl. 317 (1897); Penn Plate Glass Co. v. Insurance Co., 189 Pa. 255, 42 Atl. 138 (1899); Needy v. German-American Insurance Co., 197 Pa. 460, 47 Atl. 739 (1901); Fritz v. British-American Assurance Co., 208 Pa. 268, 57 Atl. 573 (1904); Seibel v. Fireman's Insurance Co., 24 Pa. Sup. 154 (1904); Andree Curran v. Philadelphia, 264 Pa. 111, 107 Atl. 636 (1919).
11. Ibid.
12. 16 Phila. 568 (Pa. 1883).
13. 4 Watts 39 (Pa. 1835).

It may be noted that "general" arbitration clauses have not been held irrevocable because of a provision that "the decision of the arbitrators shall be final and conclusive," or that "all actions or suits at law or in equity are hereby waived."[14]

Apparently a court of equity in this State will not grant a decree ordering either party to arbitrate a future dispute agreement where the arbitrators have not been named. The court in *Kaufmann v. Liggett*,[15] after denying equitable relief, says, "this upon the very good ground that the courts remain open to the parties with better provisions for securing justice than are possessed by arbitrators," and also, "a court of equity will not undertake to compel an arbitration which it cannot control. . . ." A different rule however has been applied by the courts of this State regarding the arbitrament of future disputes when a "general clause" is not provided. Thus, where the parties have agreed to submit any dispute arising out of the breach of a contract to arbitrators named in the tribunal, the courts have held that "they are bound by their contract, and cannot seek redress elsewhere."[16] It should be noted that no provision specifying that the "decision of the arbitrators is final" or that "actions at law or in equity are waived" need be included in the arbitration clause to make it irrevocable.[17]

Disputes Concerning Clauses in Fire Insurance Policies. The courts of this State have treated dispute clauses in fire insurance policies somewhat differently from such clauses in other types of contracts. The reason for this special treatment is due to the fact

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14. Snodgrass v. Gavit, 28 Pa. 221 (1857); Mentz v. Insurance Co., 79 Pa. 478 (1875); Needy v. German-American Insurance Co., 197 Pa. 460, 47 Atl. 739 (1901).

15. 209 Pa. 87, 58 Atl. 129 (1904).

16. Lauman v. Young, 31 Pa. 306 (1858); Fox v. Hempfield Railroad Co., 1 Pittsburgh reports 372, 14 Leg. Int. 148 (Pa. 1859); Reynolds v. Caldwell, 51 Pa. 298 (1865); O'Reilly v. Kearns, 52 Pa. 214 (1866); Quigley v. DeHaas, 82 Pa. 267 (1876); Hartupee v. City of Pittsburgh, 97 Pa. 107 (1881); Hostetter v. Pittsburgh, 107 Pa. 419 (1884); Kennedy v. Poor, 151 Pa. 472, 25 Atl, 119 (1892); Gowan v. Pierson, 166 Pa. 258, 31 Atl. 83 (1895); Harlow v. Borough of Wilkinsburg, 189 Pa. 443, 42 Atl. 135 (1899); Frederick v. Margworth, 221 Pa. 418, 70 Atl. 797 (1908); Hallock v. Lebanon City, 234 Pa. 359, 73 Atl. 333 (1909); Curran v. Philadelphia, 264 Pa. 111, 107 Atl. 636 (1919); Commonwealth v. Union Paving Co., 288 Pa. 571, 136 Atl. 856 (1927).

17. Kennedy v. Poor, 151 Pa. 472, 25 Atl. 119 (1892); Somerset Borough v. Ott, 207 Pa. 539, 56 Atl. 1079 (1904).

that these clauses usually provide merely for a determination of the amount of loss or damage under the policy by the arbitrators — to be appointed by the parties. In *Mentz v. Armen Fire Insurance Co.*,[18] a clause in the policy provided that "in case any difference or dispute shall arise between the assured and this company touching the amount of any loss or damage sustained by him . . ." same shall be submitted to arbitrators to be selected by the parties "and no action, suit or proceedings at law or in equity shall be maintained on this policy, unless the amount of loss or damage in case of difference or dispute shall be first thus ascertained." The plaintiff, the insured, brought an action in a court of law upon the policy. The defendant requested a non-suit on the ground that the action at law was in violation of the arbitration clause. The plaintiff contended that he was not bound by the clause, since the defendant had not asked for an arbitration. The court refused to grant the non-suit.

The following statements of the court are significant:

"(1) There can be no doubt that if this case stood upon a general arbitration clause in the policy alone it would fall within the principles settled by this court, conformable to all the previous English authorities in *Gray v. Wilson*, 4 Watts 411; *Snodgrass v. Gavit*, 4 Casey 224, and *Lauman v. Young*, 7 Id. 310; that it is not in the power of the parties to a contract to oust the courts of their jurisdiction.

"The cases in which the certificate or approbation of any particular person — as the engineer of a railroad company — to the amount of a claim is made a condition precedent to an action, rest upon entirely different principles. He is not created a judge or arbitrator of law and facts, but simply an appraisee of work done. *Monongahela Navigation Company v. Fenlon*, 4 W & S, 205; *Lauman v. Young*, 7 Casey 306. In all these cases there is an actual reference founded upon consideration, and therefore irrevocable. That which is before us is a mere agreement to refer to arbitrators to be chosen at a future time; (2) that since the arbitration clause was restricted to a decision upon the amount of loss or damage, it was a 'special' and not a 'general' agreement, but even in such case, it was incumbent on the defendants below, in order to avail themselves, to show that a dispute had arisen touching the amount of the loss. In other words, they must show that they admitted the validity of the policy, and their liability under it, and that the only question was as to the extent of the loss."

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18. 79 Pa. 478 (1875).

It appears from this case that the term "general" has taken on an additional meaning. Its former meaning referred to agreements to arbitrate, wherein the arbitrators were not named. Under the ruling in this case it is also used to distinguish a submission of law and fact, from a submission of fact only. In the latter instance it is "special"; in the former, "general." It is double meanings of this kind that have added to the confusion in arbitration decisions in this state.

The decision in this case, therefore, stands for the proposition that agreements to refer facts alone to arbitrators (to be selected in the future) may be disregarded in the absence of the Company's admitted legal responsibility under the policy. That much is certain — but suppose the Insurance Company had admitted its legal liability. Would the court in the *Mentz* case have held that, since the arbitrators were not named in the agreement, the insured was at liberty to disregard the arbitration for the ascertainment of the loss, which had been made a condition precedent to an action at law? Apparently the answer is in the affirmative. Then Quere, if the arbitrators were named in the agreement, but the Insurance Company failed to admit its legal liability, — could the insured demand that the loss be determined by arbitration, or must it be ascertained by an action at law? Apparently, under this decision, the Insurance Company could revoke the authority of the arbiters where it was not willing to admit its legal liability. If these inferences are correct, then it would seem that, under the common law the status of arbitration clauses in fire insurance policies is less secure from revocation and more doubtful than such clauses in other types of agreements. A study of the subsequent insurance cases, involving agreements to arbitrate, does not greatly clarify the position of the courts and, therefore, it will receive only passing mention.[19] In *Commercial Union Assurance Company v. Hocking*,[20] the court held a clause (similar to that in the *Mentz* case) to be revocable because the arbitrators were not named. It was also held in this case that the provision, making the arbitration a condi-

19. For a detailed analysis of these cases see Sturges, W. A., Arbitrations under the New Pennsylvania Arbitration Statute, U. of P. Law Review, vol. 76, No. 4, p. 366 et seq.

20. 115 Pa. 407, 8 Atl. 589 (1887).

tion precedent to any recovery on the policy, did not render the clause irrevocable. The *Mentz* case was cited. In *Boyle v. Insurance Company*,[21] it was decided that, if either party failed to cooperate in arriving at the loss, the other party might disregard the provision for submission to arbitration and might bring action in a court of law. In *Yost v. Insurance Company*,[22] the court noted that the arbitrators were unnamed in the agreement and also emphasized that the Insurance Company had contested its liability. Both the *Mentz* and *Hocking* cases were cited in the conclusion that such an arbitration agreement is revocable under the circumstances. In the case of *Penn Plate Glass Company v. Insurance Company*,[23] it is said:

"It has been held that the condition of the policy as to appraisements before suit is, in substance, no more than an undertaking to refer to arbitrators to be chosen in the future, and therefore revocable. Suit by the insured without preliminary appraisement has been sustained, because the agreement — being revocable — could not bind him. *Mentz v. Insurance Company, Commercial Union Assurance Company v. Hocking; Yost v. McKee.*"

The most recent case of this nature decided by the Supreme Court of this State was *Fritz v. British-American Assurance Company*.[24] In this case it was stated that if the parties could not come to an agreement over the loss and had selected the arbitrators, "the hands of the insured were then tied until an award had been made or the appraisement had been abandoned." Furthermore, that if the arbitrators could not reach an agreement, or if for any reason not due to the insured they were prevented from making an award, such action amounted to an abandonment and released the insured to enforce his claim by action at law.

It would seem to the writer that the tendency of the courts is to view these arbitration clauses in insurance policies as inserted for the benefit of the insurance company so that the insurers may protect themselves from having the amount of loss determined by a jury. But is it not reasonable to suppose that in some instances the insured, as well, is interested in having the amount of the loss de-

21. 169 Pa. 349, 32 Atl. 553 (1895).
22. 179 Pa. 381, 36 Atl. 317 (1897).
23. 189 Pa. 255, 42 Atl. 138 (1899).
24. 208 Pa. 268, 57 Atl. 573 (1904).

termined by arbitrators and not by a jury? Therefore, why should the court refer only to the insured in remarking that the hands of the insured are tied until an award has been made or the appraisement has been abandoned. The writer can see no harm resulting to either party by requiring determination of the facts by a tribunal other than a jury, which the parties have explicitly chosen. The only answer seems to be the archaic one that "the jurisdiction of the courts cannot be ousted." But that reason, if such it may be called, vanishes when the courts decree that disputes may be settled by arbitration when the arbitrators are named in the agreement. What difference should it make whether they are named or not? In principle it would seem none. In both instances they agree to submit their differences to third parties for settlement. In the one case they name those parties; in the other they do not name them, but agree as to the manner in which they shall be chosen. Should the default of one party to an agreement in either case be grounds for avoiding the agreement? In legal theory it would not seem so. Especially is this true where there is a consideration for the agreement. The mutual promises of the parties have long been deemed a valid consideration in the field of contract law. Why does this not follow in the common law on arbitration? The following statement, from an opinion in the Supreme Court of Pennsylvania probably answers this query as well as it can be answered:

> "It is much to be regretted that agreements to arbitrate, founded upon consideration, should be excepted from the general law of contracts and treated as revocable by one party without the consent of the other. But the law is too firmly settled to be changed without legislative authority."[25]

This statement shows the need that existed for legislative enactments concerning arbitration.

The Grounds for Vacating Awards at Common Law.

(1) *In General.* Up to this point the discussion has dealt with the means of enforcing an agreement of parties to arbitrate. If the agreement is such that the courts can enforce it, then the jurisdiction of the arbitrators attaches, and the case goes before them for settlement. The parties present their evidence and the duty falls

25. Henry v. Lehigh Valley Coal Co., 215 Pa. 451, 64 Atl. 633 (1906).

upon the arbitrators to make their decision. The decision is termed an award.

Simply because the arbitrators make an award does not always signify that a final disposition of the case has been reached. An award may be an improper one for several reasons. The arbitrators are not given unlimited authority, but are bound by the agreement of the parties and are also supposed to make a fair and honest decision in the case. The question arises — for what causes may either party move to have the award set aside? A brief discussion of the grounds for vacating an award under the rules of the common law follows.

(2) *The Award Must Follow the Submission.* In order to be valid, a common law award in Pennsylvania must follow the submission.[26] If the arbitrators decide points other than those specified in the submission,[27] or do not decide all of the points submitted to them, the error in either case is sufficient to invalidate the award.[28] Where the submission provides that "all disputes arising between the parties are to be submitted to arbitration," it is error if the arbitrators decide only the facts and leave the question of law for the court.[29] Other examples of discrepancies in awards are where the submission calls for a written award or an award under seal, and the arbitrators present it in oral form, or written but not sealed;[30] or where the submission calls for the award to be rendered within a specified time, and the arbitrators render it at a later date.[31]

(3) *The Award Must Be Conclusive.* An award at common law must be conclusive, leaving nothing to be decided in the future, else it will be set aside.[32] The intent of the parties, upon submitting

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26. Connor v. Simpson, 104 Pa. 440 (1883).
27. Noble v. Peebles, 13 Serg. & Rawle 319 (Pa. 1825).
28. Hamilton v. Hart, 125 Pa. 142, 17 Atl. 473 (1889); Kann v. Bennett, 234, Pa. 12, 82 Atl. 1111 (1912).
29. Connor v. Simpson, 104 Pa. 440 (1883).
30. Rea v. Gibbons, 7 Serg. & Rawle, 204 (Pa. 1821); Weaver v. Powell, 148 Pa. 372, 23 Atl. 1070 (1892).
31. Johnson v. Crawford, 212 Pa. 502, 61 Atl. 1103 (1905).
32. Connor v. Simpson, 104 Pa. 440 (1883); Hamilton v. Hart, 125 Pa. 142, 17 Atl. 473 (1889); Frederick v. Margworth, 221 Pa. 418, 70 Atl. 797 (1908).

a difference to arbitrators, is to obtain a final adjudication of the question. If the award is not definite and conclusive, the purpose of the arbitration is defeated. The Supreme Court of Pennsylvania, in deciding the case of *Connor v. Simpson*,[33] states:

> "The arbiter, accepting his office, made what purports to be an award; does it possess the qualities and requisites of one? We think it does not. His award is in the alternative, and there is no proper tribunal to which the pending question submitted by the arbiter can be referred, until his jurisdiction is determined; the parties intended to be obliged only by what the arbiter himself declared to be his award. The question of difference is undetermined; the award is not final . . . it is uncertain and indefinite. What would constitute a sufficient tender of performance on the part of the defendant, or what breaches could be assigned in formal pleadings on the part of the plaintiff? The breach is, itself, the cause of action, and unless that be assigned — the defendant may demur. An award at the common law is in the nature of a judgment and ought to be wholly decisive; for if it doth not determine the matter it becomes the cause of a new controversy."

But in *Brock v. Lawton*,[34] the award provided that the defendant transfer to the plaintiff eighty shares of stock of a certain corporation, or, if that were impossible because of a prior transfer to innocent purchasers, then the defendant should pay to the plaintiff a certain sum of money. The court stated: "that an award may be in the alternative is well settled." It then went on to specify that the alternative must be certain and not reserve further control in the arbitrators.

(4) *Failure of the Arbitrators to Arrive at a Unanimous Award.* In the absence of a provision in the submission permitting a majority award, the courts have held that the decision of the arbitrators must be unanimous or it can be set aside.[35] Where by a term of the submission a third arbitrator is to be appointed by the arbiters upon failure to agree, it has been held that a majority award of all is valid.[36]

(5) *Fraud, Corruption and Misbehavior of the Arbitrators.* The earlier Pennsylvania decisions seem to support, without

33. Ibid.
34. 210 Pa. 195, 59 Atl. 997 (1904).
35. Weaver v. Powell, 148 Pa. 372, 23 Atl. 1070 (1892).
36. Quay v. Westcott, 60 Pa. 163 (1869).

qualification, the rule that fraud, corruption, or misconduct of the arbitrators are grounds for setting aside an award. Mr. Justice Strong, in his opinion in the case of *Speer v. Bidwell*[37] says:

"But none of the cases have gone so far as to hold that corruption or misbehavior of the arbitrators is remediless, when the parties to a submission have agreed that there shall be no exceptions, or appeal. And there is no more reason why a common law award should be unassailable for these causes than there is for protecting a statutory award against them. In neither case can it be presumed that the parties intended or agreed to be bound by anything short of an honest exercise of the judgment of the arbitrators upon the questions submitted. Mistakes they may have considered possible, and assumed the risk of them, but misconduct of the selected tribunal is a thing not anticipated, and therefore not waived by any agreement to submit to the award.

"Unless, then, the evidence offered and received in the court below tended to prove something more than mere mistake of fact or of law; unless it went to establish misbehavior on the part of the arbitrators or the plaintiff, it was inadmissible to affect the award upon which this suit is brought. That a plain mistake was made is clear, but that is not enough. Was there misbehavior?"

It appears that one of the parties in this case participated in the misconduct of the arbitrators, but the court did not lay any stress on the point. It should be noted therefore, that even though the submission specifies that the parties shall have no exception or appeal, nevertheless, fraud, corruption, or misconduct of the arbitrators will, if proved, be sufficient ground for vacating the award.

The later decisions in Pennsylvania hold that in order that an award may be set aside for fraud, or misbehavior of an arbitrator, the party benefited thereby must have been implicated in it.[38] In the case of *Hartupee v. Pittsburgh*, it was held that evidence that an arbitrator was partial and unfair and knowingly made an improper decision was not sufficient ground for setting aside the award. In the case of *Hostetter v. Pittsburgh*, the opinion of the court upon the point is as follows:

37. 44 Pa. 23 (1862); see also Paul v. Cunningham, 9 Pa. 106 (1853).
38. Hartupee v. Pittsburgh, 131 Pa. 535 (1889); Hostetter v. Pittsburgh, 107 Pa. 419 (1884); English v. Wilmerding Borough School District, 165 Pa. 21 (1894); Frederick v. Margworth, 200 Pa. 156, 49 Atl. 881 (1901).

"The award, like a judgment, may undoubtedly be impeached for fraud, which avoids all judicial acts. The fraud, however, must be actual and intentional, and not constructive, such as flows from an erroneous or unjust judgment. Partiality and some improper conduct of the arbitrator in making the award will not impeach it unless the party benefited thereby be implicated in that misconduct; Braddick v. Thompson, 8 East, 344. The award of a referee to whom questions of law and of fact are submitted cannot be impeached and avoided unless by proof of fraud practiced on him, or by proof of mistake or accident, by which he was deceived or misled so that in fact the award is not the result of his own judgment. A mistake in drawing conclusions of fact from evidence or in adopting conclusions of fact from evidence or in adopting erroneous rules of law, does not avoid the award; Boston Water Power Company v. Gray, 6 Metcalf 131."

It is therefore quite evident that the common law rule in Pennsylvania holds that partiality, fraud or improper conduct of the arbitrators are not alone sufficient grounds for setting aside an award. However, when the misconduct of the arbitrators is coupled with fraud perpetrated by one of the parties who derives a benefit from the misconduct or fraud, the case assumes a different aspect and the courts allow an award reached by such means to be impeached. The reason for this rather peculiar ruling of the courts seems to lie in the fact that the parties not having provided for an appeal in their agreement, impliedly waive possible misconduct on the part of the arbitrators, since they themselves have chosen the arbitrators. It must be noted, however, that the party against whom the arbitrator has perpetrated a fraud, has a right of action against the arbitrator for the damage suffered.[39]

The mere fact that the arbitrator is an interested party does not furnish grounds for setting aside an award.[40]

(6) *Mistake of Law or Fact by the Arbitrators.* It appears from the decisions in Pennsylvania that a common law award will not be set aside because the arbitrators have made a mistake either of law or fact. The Supreme Court in *Speer v. Bidwell*,[41] has ruled on the point as follows:

"The award upon which the suit was brought was made under a submission which the parties had bound themselves to make by their articles of co-

39. Reynolds v. Caldwell, 51 Pa. 298 (1865); Hostetter v. Pittsburgh, 107 Pa. 419 (1884); Frederick v. Margworth, 200 Pa. 156, 49 Atl. 881 (1901).
40. Monongahela Navigation Company v. Fenlon, 4 W & S 205 (Pa. 1842).
41. 44 Pa. 23 (1862).

partnership. The agreement of submission contains no stipulation that an award made under it should not be subject to exception for any cause, but the articles of co-partnership which provided for the submission, declared that the award of the referee, or a majority of them, should be final, conclusive, and binding on both partners. And 'that there should be no appeal.' As the award was at common law, and not under any rule of court, it is not easy to perceive that the express exclusion of any right of appeal, and the provision that it should be 'final, conclusive, and binding upon both partners,' give to it any different effect from that which belongs to common law awards generally. If they follow the submission they are binding, without any express agreement that they shall be so. Nor are they to be set aside merely because the arbitrators have mistaken the law, or made a mistake of fact. Certainly they are not, when no mistake appears on the face of the award. By the submission the arbitrators are made judges of the law and of the facts, and the parties agree to be bound by their decision. They take the hazard of mistake in the tribunal which they have selected."

The following statement of the Supreme Court is also significant:

"They (the arbitrators) were constituted by the parties the ultimate judges of the competency of the witnesses and of the admissibility, weight and relevancy of the evidence; they were the tribunal to which the parties submitted for final judgment the law and the facts of the case . . ."[42]

The reason for the above rule is that the parties have provided in their agreement that their disputes shall be decided by arbitrators of their own choosing. As a result, they impliedly agree to accept the decision of the arbitrators even though the arbitrators reach an erroneous conclusion of fact or erroneously apply rules of law. The courts hold that the agreement of the parties, since it does not expressly state that an appeal may be taken where such errors prevail, implies that the award shall be final. Of course the parties may by their agreement provide for an appeal from errors of law or fact but if such appeal is not specified, then the award is held to be final.

Means Provided by the Common Law for the Enforcement of an Award.

An award at common law is not a judgment. In order to obtain a judgment the successful party must bring a suit in a proper

42. March v. Lukens, 214 Pa. 206, 63 Atl. 427 (1906).

court,[43] pleading the submission agreement and the award.[44] It should be noted, however, that if the agreement to arbitrate authorizes the successful party to confess judgment on the award, no action at law is necessary.[45]

Where the award states that the defendant does not owe the plaintiff any money, such award may be pleaded by the defendant as a bar to any subsequent legal action brought by the plaintiff where the cause of action is the same.

Statutory Provisions for Arbitration in General.

Arbitration in Pennsylvania may be divided into five types: (1) those which are governed by the principles of the common law; (2) those which may be conducted under a statute providing for voluntary arbitration; (3) those which are governed by a statute providing for voluntary arbitration of actions pending in a court of law; (4) those which may be submitted under statutes providing for compulsory arbitration of actions pending in a court of law; (5) those which are conducted under the rules of trade associations, exchanges, or any other trade bodies. The first of these types has been discussed;[46] the second, third and fourth will be discussed presently;[47] the fifth will be discussed in a later chapter.[48]

Before entering into a discussion of arbitrations under statutory provisions, frequently termed "statutory arbitration" several important observations must be made. In the first place, it is not the intention of the parties in a common law arbitration to bring their dispute to a court of law for settlement. On the contrary, they clearly intend to avoid courts of law. If the arbitration procedure is carried out without default by either party, the aid of the courts is not sought until an award has been rendered, and not then if the losing party is willing to perform the obligation specified in the award. However, if the losing party fails to obey the award, then, for the first time the assistance of the courts is enlisted.

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43. McKhillip v. McKhillip, 2 Serg & Rawle 489 (Pa. 1816); Richardson v. Cassidy, 3 Watts 320 (Pa. 1834); Climenson v. Climenson, 163 Pa. 451, 30 Atl. 148 (1894).
44. Hart v. Hamilton, 125 Pa. 142, 17 Atl. 473 (1889).
45. Atwood v. Wanamaker, 26 Pa. Sup. 591 (1904).
46. Supra, p. 40 et seq.
47. Infra, pp. 57-60; 60-64; and 64-71 respectively.
48. Infra. pp. 119-149.

Arbitrations under statutory enactments are based on a different premise. In this type the aid of the courts is sought in the very beginning. It may be obtained in either of two ways: (1) by a provision in the submission for the entry of a rule of court, or (2) in the case of a compulsory arbitration by either party entering a rule of court requiring his adversary to submit to arbitrators a dispute already pending in court. It will be readily observed that in statutory arbitrations the jurisdiction of the courts attaches to the cause before the arbitration proceedings are held, while in the common law type it does not attach until after the proceedings are over and an award has been rendered.

Satutory and Common Law Arbitrations. The second important difference between statutory and common law arbitrations lies in the fact that in order to obtain the benefits of statutory arbitration, the various provisions of the enabling Act must be strictly followed. In common law arbitrations, the parties have more freedom in selecting the method of procedure which they desire.

In 1927, as has been previously noted, the Legislature of Pennsylvania passed an Act which made possible a new era in commercial arbitration. In order properly to understand the present status of agreements to arbitrate, it is advisable to review briefly the earlier legislation dealing with the subject. In all, twenty arbitration statutes were formulated by the various legislatures from 1705 to 1927. Nine of these were enacted between 1705 and 1836. In the year 1836 the Legislature apparently thought it necessary to codify the existing statutes and also to provide for a more definite system of procedure in arbitral matters. Accordingly, the Arbitration Act of 1836[49] was enacted. This piece of

49. See Purdon's Pennsylvania Statutes Annotated, Permanent Edition, Title 5, p. 259, n. 1, wherein the following historical reference is found: "The Act of 1836, June 16, P. L. 715, was intended to supply and to incorporate all the provisions of the acts of 1705, 1 Sm. L. 50; 1806, March 1, P. L. 558; 1808, March 28, P. L. 168; 1809, March 29, P. L. 125; 1810, March 20, P. L. 145; 1813, February 25, P. L. 87; 1820, March 28, P. L. 321; 1824, February 23, P. L. 27; 1825, April 11, P. L. 172. There has been some question whether the Act of 1806 was repealed. See Marshall v. Bozorth, 17 Pa. 409 (1851); Pennington v. Bowman, 10 W. 283 (1840). Note, the point was not in issue in either of these cases and they do not even attempt to hold that the Act of 1806 was not repealed. They were not passing upon the point in either case.

legislation except for minor supplements and amendments, supplied the basis for statutory arbitration until 1927.

There is no need for an examination of the statutes prior to 1836 because the Act of that date was intended to repeal all previous arbitration legislation.[50] It would appear that the least confusion will result from a study of the Act of 1836 and its amendments by discussing its provisions under the subjects of: (1) voluntary agreements to arbitrate where no legal action is pending; (2) voluntary agreements to arbitrate actions pending in the courts; (3) compulsory arbitration of actions pending in the courts. A brief resume of these three phases of statutory arbitration, together with important court decisions interpreting the statutory provisions will be presented.

Statutory Provisions for Voluntary Arbitration Where no Legal Action is Pending.

The Act of 1836 provides for arbitration of a voluntary nature where there is no action pending in the courts. A discussion of the essential phases of this type of arbitration follows.

The Types of Disputes Which May Be Submitted. The statute[51] provides that it shall be lawful for all persons to end, by arbitration, any controversy, suit or quarrel, except such as affect the title to real estate. In interpreting this section, the Supreme Court of Pennsylvania has ruled that actions of ejectment[52] and partition[53] are prohibited. The wording of the statutory provision[54] clearly indicates that existing disputes only are subject to this form of arbitration. Accordingly the most important type of arbitration agreement, namely, that which provides for the settlement of future disputes, is not brought within its scope.

Requisites of the Submission. The submission to arbitration must be in writing.[55] If it is oral, it is governed by the common law

50. Act of June 16, 1836, P. L. 715.
51. Act of June 16, 1836, P. L. 715, Sec. 1.
52. Duer v. Boyd, 1 S. & R. 203 (1814).
53. Bellas v. Dewart, 17 Pa. 85 (1851).
54. Supra. Act of 1836, Sec. 1.
55. Ibid.

and cannot receive the benefits of the statutory procedure. The submission must contain an agreement that it be made a rule of court else it is wholly inoperative.[56] Furthermore, a statement that the submission is "under the Act of 1836" does not bring the submission within the statutory provision.[57]

Although there is no specific statutory provision made that the arbitrators must be named in the submission, the courts have held that a failure to do so makes the submission revocable.[58] Therefore, if the arbitrators are not named in the submission, it is treated as a common law arbitration.

The Steps Necessary to Procure the Arbitration. The parties having entered into a written submission, naming the arbitrators and providing that the submission shall be made a rule of court, may upon producing an affidavit of agreement in court request that the same be made a rule of court. It then becomes a duty of the court to issue a rule that the parties "submit to, and finally be concluded by arbitration or umpirage," as provided in the submission of the parties.[59] Means are thus provided for obtaining the assistance of the courts in compelling an arbitration.

Revocability of the Submission. Once a submission has been made a rule of court, it cannot be revoked, even by the court.[60] Any attempt to revoke therefore amounts to a contempt of court.

The Award. The award must follow the submission and must be certain, as in a common law arbitration.[61] Sec. 4 of the Act of 1836[62] provides that the party against whom an award has been made may except thereto, for any of the following causes and for no other:

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56. Fox v. Ealer, 2 M. 169 (1857); Otis v. Northrop, 2 M. 351 (1839); Okison v. Flickenger, 1 W. & S., 257 (1841); Benjamin v. Benjamin, 5 W. & S. 562 (1843); Marshall v. Bozorth, 17 Pa. 409 (1851).
57. Benjamin v. Benjamin, 5 W. & S. 562 (1843).
58. Zehner v. Lehigh Coal & Navigation Co., 187 Pa. 487, 41 Atl. 464 (1898).
59. Act of 1836, Sec. 2.
60. Zehner v. Lehigh Coal & Navigation Co., supra n. 58; Grim v. Sarmiento, 18 Phila. 307.
61. Real Estate Title Ins. & Trust Co. v. McNichol, 217 Pa. 545, 66 Atl. 768 (1907).
62. Supra., p. 57, n. 50.

"I. That the arbitrators or umpire misbehaved themselves in the case, or

"II. That they omitted a plain mistake in matter of fact, or matter of law, or

"III. That the award was procured by corruption or other undue means."

There are two distinct situations which may arise under this section. One, where no mention is made in the submission concerning an exception to the award, the other where the parties do provide that no exception to the award shall be taken.

Consideration will first be given to the former type in which no provision is found concerning exception. Where this type of submission is used, the courts have held that exceptions may be taken for any of the three causes specified in the Act.[63] The errors of fact or law must be clearly shown and be more than mere suspicions of error.[64]

Under this type of submission where the court finds an error of law or fact, "it has no power to make a new or different award, based on a different view of the law or facts, thus substituting the judgment of the court for that of the chosen arbitrators, but only such power as the court has over a verdict, to sustain it or set it aside as a whole."[65] Likewise the court cannot reduce the amount of the award.[66]

In the second type of submission where the parties provide that no exceptions shall be taken to the award, the courts have applied somewhat different rules. Apparently the first and third grounds for exception provided by the Act concerning misbehavior and corruption or other undue means still remain sufficient cause for avoiding the award.[67] The second ground for exception, i. e. errors of law or fact by the arbitrators has been eliminated by the courts as cause for avoiding the award where the right of appeal is waived. Therefore, an award made under this type of submission may not

63. Speer v. Bidwell, 44 Pa. 23 (1862); Liverpool & London & Globe Ins. Co. v. Goehring, 99 Pa. 13 (1881).
64. Riley v. Hirst, 1 Phila. 146 (1850); Chambers v. McKee, 44 Pitts. 367 (1896).
65. Gunn v. Bowers, 126 Pa. 552, 17 Atl. 893 (1889).
66. Creveling, Miles & Co., 177 Pa. 267, 35 Atl. 686 (1896).
67. Speer v. Bidwell, supra; Brandon v. Forst Co., 59 Pa. 187 (1868).

be set aside because of a mistake by the arbitrators on a matter of law or fact.[68] Such statements as the following are frequently found concerning this type of submission:

"It is impossible for us to reverse this decision without entirely disregarding the stipulation which the parties made a part of their agreement of submission, namely, that neither party should have a right to except. In the absence of that stipulation they had, under the Act of Assembly, a right to except for three causes, and for three only. One of those causes was a plain mistake in matter of fact or law. The only imaginable purpose of the agreement not to file exceptions was to take away this right. Each party agreed to take the risk of mistakes by the referees. If, as contended by the plaintiff in error, the effect of the stipulation was only to waive exception to mistaken judgment, then it was entirely unmeaning, for that was done by the submission itself, without the provision that neither party should have a right to except. The plaintiff in error has therefore withdrawn from the court its power to rectify a mistake of fact, if one was made. That the court may disregard the agreement of the parties not to appeal or file exceptions has not been seriously contended, and certainly cannot be claimed successfully. Where the agreement of submission merely stipulates that the award shall be 'final and conclusive', exceptions have been entertained. Such was the case of Mussina v. Hertzog, 5 Binn. 387."[69]

The Enforcement of the Award. Under Section 5 of the Act of 1836, if the exceptions are not filed within the time limit, or if the exceptions are not allowed, the court is authorized to confirm the award. It is also provided that if the party against whom a valid award has been rendered neglects or refuses to perform it, the court is authorized upon proper motion to order an execution to carry the award into effect. The court may also consider the defaulting party to be guilty of contempt of court, and may issue proper process to punish the offense.

Statutory Provisions for the Voluntary Arbitration of Pending Actions.

It should be noted that in this type of arbitration the parties have actually begun an action upon the dispute in a court of law. Before the case has reached the trial stage the parties may agree to submit either of two questions to arbitration. They may agree

68. Rogers v. Playford, 12 Pa. 181 (1849); Wightman v. Pettis, 29 Pa. 283 (1857); Large v. Passmore, 5 S. & R. 51 (1819); McCahan v. Reamey, 33 Pa. 535 (1859); Speer v. Bidwell, 44 Pa. 23 (1862).

69. McCahan v. Reamey, 33 Pa. 535 (1859).

to submit only the questions of fact involved, leaving questions of law for the determination of the court, or they may agree to submit and be bound by the decision of the arbitrators upon both questions of fact and law.

The various phases of submissions of questions of fact to arbitrators will be considered first. Under section 3 of the Act of 1836 it is lawful for the parties to any suit to consent to submit to arbitrators all matters of fact involved in the suit, reserving all matters of law for the decision of the court. In order that such a submission may be valid, it must be the intention of the parties to have the same made a rule of court. The courts have interpreted this section to mean that the submission does not expressly have to provide that it shall be made a rule of court, so long as it appears to be the intention of the parties.[70] It has been held that a reference made to the action will show sufficient intention.[71] In the absence of any intent being shown or a contrary one being evident the reference to arbitration is not valid.[72]

The decision of the facts having been made, the arbitrators make a report to the court. This report has the same effect as a special verdict in an action at law.[73] The court applies the law to the award on the facts and enters the proper judgment. A writ of error to a higher court may be entered upon the judgment as upon any judgment entered before a special verdict. If no writ of error is filed, the person in whose favor the judgment is rendered may have execution as upon any other valid judgment.

The various phases connected with a submission to arbitrators of both law and facts in a pending action will be seen to be somewhat different. Sec. 6, [74] of the Act of 1836 deals with this type of submission.

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70. McAdam's Executors v. Stillwell, 13 Pa. 90 (1850); Buckman v. Davis, 28 Pa. 211 (1857); Painter v. Kistler, 59 Pa. 331 (1868); Quay v. Westcott, 60 Pa. 163 (1869); Summy v. Hiestand, 65 Pa. 300 (1870); Manhattan Life Ins. Co. v. McLaughlin, 80 Pa. 53 (1875).
71. Coleman v. Lukens, 4 Wh. 347 (Pa. 1839); Ford v. Kenn, 13 Pa. 179 (1850).
72. Brendlinger v. Yeagley, 53 Pa. 464 (1866).
73. See sec. 3, Act of 1836, P. L. 715.
74. This section is a re-enactment of the Act of 1705, 1 Sm. L. 49, sec. 3. See Purdon's Digest — Pennsylvania Statutes Annotated, Titles 1-6, p. 265, note 1.

Types of Disputes which may be Submitted. The courts of this state have interpreted this section to apply only to actions at law, thus prohibiting the submission of disputes which have been started in courts of equity.[75] The disputes, of course, must be actually pending in the court of law before a submission can be entered into under the provisions of this section.

Requisites of the Submission. The same provision concerning the necessity for a rule of court to be agreed upon applies to this type of submission as to that governed by section 3. That is to say, the mere intention to have a rule of court entered is sufficient[76] apparently under this section. The submission must contain the names of the arbitrators who must be selected by the mutual consent of the parties.

Steps to be taken by the Parties to Procure the Arbitration. A valid submission having been drawn, a rule of court is requested from the court. The submission must be presented and proved.

Proceedings to be Taken by the Court. The court having been petitioned for a rule, and being satisfied that the submission is proper will order the dispute to be submitted to the named arbitrators under a rule of court.

Revocability of the Submission. In *McGheehan v. Duffield*,[77] it was held that a submission to a final reference in consideration of a discontinuance of proceedings in an action in court is irrevocable.

The Award. In order that an award may be valid under this section it must have been such a finding as could be accepted as a verdict of a jury.[78] The award to be valid must be the joint finding of all of the arbitrators, as a finding of a majority is no more valid than the verdict of a majority of a jury, unless the parties have agreed in the submission to be bound by a decision of a majority. The approval of the court is necessary to give an award the effect

75. Cotton v. Babcock, 64 Pa. 462; Danville v. Hazleton & Wilkes Barre R. R. Company's Appeal, 81 Pa. 326 (1876).
76. See cases cited supra n. 70 and 71.
77. 5 Pa. 497 (1846).
78. Coleman v. Lukens, 4 Wh. 347 (Pa. 1839); Pennington v. Bowman, 10 W. 283 (Pa. 1840); Wilson v. Brown, 82 Pa. 437 (1876).

of a judgment.[79] Before it is so approved by the court it has no greater effect than a verdict of a jury.[80]

Concerning mistakes in awards, the opinion of the court in the case of *Coleman v. Lukens* [81] is significant:

"The mistake spoken of in the clause of the section under consideration (Sec. 7) ought to be construed to mean a plain mistake, such as becomes, at once, perfectly obvious to every one, immediately upon its being pointed out or mentioned, so that there can be no diversity of opinion in regard to it: as for instance, a mistake in adding up the items of an account, or placing inadvertently a debit on the credit, or a credit on the debit side of the account, or in subtracting the amount of the credits from the debits, etc. by making the difference either more or less than it ought to be, according to the ordinary rules of arithmetic; or, in short, any mistake of a mere clerical nature. And as regards the mistake in law, spoken of in the same clause, it would seem as if the legislature intended to embrace only such as shall appear on the face of the award itself, or shall arise upon facts in the case not controverted or disputed. And in either case of mistake, whether it consists of fact or law, the court, in referring the cause back to the arbitrators, in order to have it corrected, ought to point out and specify the mistake or error, and the correction which it shall be expedient to have made; and not leave the cause in this respect or any other, to be further proceeded in as the arbitrators shall deem expedient, unless it be consented to by the parties."

Apparently where the mistakes are not apparent the parties are bound by the award and the court will neither refer it back to the arbitrators nor set it aside.[82] Misbehavior or corruption of the arbitrators, however, are apparently good grounds for avoiding the award.[83]

It would seem that the power of the court to set aside an award or to enter a judgment is quite similar to that exercised in granting or refusing a new trial after a verdict. Its decision in the matter will not be overruled except for error appearing on the face of the record.[84]

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79. Steel v. Limeberger, 59 Pa. 308 (1868); Summy v. Hiestand, 65 Pa. 300 (1870); McGlue v. City of Philadelphia, 105 Pa. 236 (1884).
80. Stephen's Executor's Appeal, 38 Pa. 9 (1860).
81. 3 W. & S. 37 (Pa. 1841).
82. Gunn v. Bowers, 126 Pa. 552, 17 Atl. 893 (1889).
83. Speer v. Bidwell, 44 Pa. 23 (1862); Liverpool & London & Globe Ins. Co. v. Goehring, 99 Pa. 13 (1881).
84. Buckwalter v. Russell, 119 Pa. 495, 13 Atl. 310 (1888).

Enforcement of the Award. The award having been rendered, it is submitted to the court for approval, which, if given, permits the award to be made a judgment. Having taken the form of a judgment, it can be enforced by a writ of execution.[85]

Compulsory Arbitration of Actions Pending.

In General. Compulsory arbitration is a term rarely heard outside of the limits of the State of Pennsylvania, with the exception of special cases usually involving damages in condemnation proceedings, in England, as has been pointed out.[86] As early as 1810 the Legislature of Pennsylvania enacted provisions governing this type of arbitration. The Act of 1836 either codified or repealed prior statutory provisions on the subject. There is only need, therefore, to review the provision for compulsory arbitration contained in the Act of 1836, and the amendments thereto.

Compulsory arbitration must be clearly distinguished from voluntary arbitration. The distinction lies in the fact that in the voluntary type the parties agree to submit their dispute to arbitration, while in the compulsory type either of the parties may compel the other to submit the dispute, even though the other party has never given his consent to arbitrate.

Compulsory arbitration is limited in Pennsylvania to civil suits pending in court. Thus, where the parties have become involved in a controversy and one of them has brought an action in a court of law, the scene is set for the possible entry of compulsory arbitration. By following the specific procedure laid down by the Act of 1836, either party may compel the other to submit it to arbitrators instead of a jury.

The question may very well be raised concerning the constitutionality of such a legislative enactment. The Supreme Court, in the case of *Cutler v. Richley*,[87] held that the legislature may authorize voluntary arbitration proceedings without right of appeal to the courts, but cannot authorize such a compulsory proceeding. But,

85. Coleman v. Lukens, 4 Wh. 347 (Pa. 1839).
86. Supra, pp. 33-34.
87. 151 Pa. 195, 25 Atl. 96 (1892).

since the compulsory provisions of the Act of 1836 provide a right of appeal to the courts, it is constitutional, inasmuch as the party against whom the award is rendered is not deprived of his day in court. It should be noted that the provisions of this statute concerning compulsory arbitration are no longer applicable to cases entered in the courts of Phliadelphia County.[88]

The compulsory arbitration features of the Act of 1836 are infrequently used and for this reason only a brief survey of its outstanding provisions will be made. There are six distinct phases of compulsory arbitration which should be briefly considered. They are: (1) the rule of reference; (2) the choice of arbitrators; (3) proceedings before the arbitrators; (4) the award; (5) grounds for setting aside the award; (6) the appeal from the award.

The Rule of Reference. Either party in any civil suit may enter a rule of reference in the prothonotary's office whereby he demands that arbitrators be chosen on a specified day, not to exceed thirty days thereafter, for the determination of all matters at variance in the suit between the parties.[89] It is necessary for the plaintiff to have filed previously a statement of claim in the legal action.[90] Likewise, the defendant is not permitted to enter a rule of reference until he has filed a sufficient affidavit of defense.[91] These two provisions were evidently enacted for the purpose of preventing either party from attempting to compel the other to submit to arbitration a dispute lacking merit. If the statement of claim does not show a legal cause of action, the defendant may demur. On the other hand, the plaintiff can ask for a judgment for want of a sufficient affidavit of defense if the defendant's affidavit does not show a defense which is legally sufficient.

The rule of reference is invalid if entered within thirty days of the date on which the case is set for trial.[92] This is to prevent either party from a last minute shift to arbitration after his adver-

88. The Act of May 1, 1861, P. L. 251, sec. 1 repealed the compulsory provisions of the Act of Jun 16, 1836, P. L., 715.
89. Act of June 16, 1836, P. L. 715, sec. 8.
90. Ibid., sec. 9.
91. Act of May 14, 1874, P. L. 159, sec. 1.
92. Act of 1836, sec. 10.

sary has prepared for litigation. It also prevents the possibility of delay.

The rule of reference having been filed with the prothonotary, it is the latter's duty to enter it upon the record, and to give the party taking out the rule a certified copy thereof. The recipient of such rule also must serve a copy of the same upon his adversary not less than fifteen days prior to the date set for the selection of the arbitrators, under a penalty of twenty-five dollars. The courts have required a strict compliance with the terms of this section.[93] Accordingly, even though a party is actually aware of the rule, if service of it has not been made upon him, he is not bound to submit to the arbitration.[94] Furthermore, if there are several defendants, service must be made on each one of them.[95]

The Choice of the Arbitrators and Time and Place of Meeting. Sections 13 to 16 of the Act of 1836 deal with these matters. Section 13 provides that the number of arbitrators lies within the discretion of the parties, but, if they cannot agree on this matter, then the prothonotary shall specify whether there shall be three or five. If both parties are present, and can agree upon the persons to serve as arbitrators, their decision is final. If, however, they cannot agree, then a method of selection is provided whereby each party submits a list of names and, by a prescribed process of elimination, the arbitrators are finally selected.

If the party who has taken out the rule of reference, alone, is present on the day appointed for choosing the arbitrators, he must submit proof of service upon his adversary of the necessary notice. Upon failure to present such proof, further proceedings are barred.[96] This having been done, the prothonotary then determines the number of arbitrators to hear the cause. The party attending nominates his arbitrators, subject to objection by the prothonotary. The prothonotary nominates arbitrators for the absent party, subject to the objection of the party attending. If the party present and the prothonotary cannot agree upon the persons to serve as arbiters,

93. McCowen v. Stephens, 1 Luz. L. Obs. 3 (Pa. 1860).
94. Hottenstine v. Austin, 43 Pa. 323 (1862).
95. Scranton v. Milspaugh, 13 Lanc. Bar, 104 (Pa. 1881).
96. Cullen v. Stough, 18 Luz. 318 (Pa. 1915).

then the same method of selection is adopted as though both parties were present and unable to agree.

The time and place of the hearing are determined by the parties if they can agree, but, in the absence of agreement, the prothonotary is empowered to arrange these matters.[97] The act specifies, however, that the prothonotary must set the date not less than ten or more than twenty days after the date of the appointment of the arbitrators. By this provision ample time is allowed the parties to prepare their cases, and yet a method is provided to prevent unreasonable delay.

Section 16 of the Act of 1836 was amended by the Act of 1877,[98] which provides that it shall be the duty of the party entering the rule of reference to serve a certified copy of the record upon each of the arbitrators and the opponent at least ten days before the date of the hearing. The service must be a personal one if the defendant resides within the county.[99]

The Proceedings Before the Arbitrators. In the event that the plaintiff only attends the hearing before the arbitrators, he must give proof that notice of the time and place of the meeting was served upon the defendant.[100] The arbitrators being satisfied concerning this fact, may proceed to hear the evidence and render an award. Where notice has been given by the defendant showing good cause for his absence, the arbitrators may adjourn the hearing.

Section 18 of the Act of 1836 provides that if all the arbitrators do not attend and proof is shown that due notice was given them, the parties may select others to fill the vacancies. If the parties cannot agree, then the arbitrators who are present may appoint others to fill the vacancies. There is no authority under the Act for supplying a second vacancy,[101] nor can one arbitrator appoint two other arbiters where only three are to determine the cause.[102] If one of the parties is absent and there is not sufficient reason

97. Act of 1836, sec. 15.
98. Act of March 23, 1877, P. L. 28, sec. 1.
99. Finch v. Lamberton, 62 Pa. 370 (1869).
100. Act of 1836, sec. 17.
101. Mitchell v. Wilhelm, 6 W. 259 (Pa. 1837).
102. Wilson v. Cross, 7 W. 495 (Pa. 1838).

given for his absence, this does not prevent the arbitrators from selecting other arbitrators to fill vacancies in their number. After all the arbitrators have met and been sworn, no vacancy thereafter arising can be filled.[103]

Under Section 19 of the Act of 1836 it is necessary that the arbitrators take an oath justly and equitably to try all matters at variance submitted to them. This oath may be administered by one of their own number. If the arbitrators do not meet on the day appointed, their proceedings thereafter are held to be irregular unless by the consent of the parties.[104] If one of the arbitrators should die after the proceedings in the hearing have begun, it is lawful for the other arbiters to continue, and if they can agree, make an award.[105] If they cannot agree upon an award, then they are empowered to select an umpire.[106]

The Award. The award, to be valid, must be signed by a majority of the arbitrators. It must be certain and definite.[107] Likewise it must not find for a larger amount than asked for in the statement of claim.[108] It must determine the law as well as the facts.[109] In so far as an award includes a matter not submitted, it is void.[110]

It is the duty of the arbitrators to file the award with the prothonotary within seven days from the date it is rendered.[111] Upon failure to file it within seven days, the arbitrators forfeit compensation.[112] The courts have held, however, that the failure to file the award within the specified time does not vitiate the award.[113] It should accordingly be noted that a penalty is imposed upon the arbitrators for their delay, but that the parties are not made to suffer because of the neglect of the arbiters.

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103. Ibid.
104. Weir v. Johnston, 2 S. & R. 459 (Pa. 1816).
105. Act of 1836, sec. 22.
106. Siskel v. Keach, 4 Luz. L. Obs. 39 (Pa. 1864).
107. Biggs v. Funk, 5 W. 478 (Pa. 1836); Henness v. Meyer, 4 Wh. 358 (Pa. 1839).
108. Biggs v. Funk, 5 W. 478 (Pa. 1836).
109. Hoffman v. Walborn, 1 Pears. 18 (Pa. 1853).
110. Babb v. Stromber, 14 Pa. 397 (1850).
111. Act of 1836, sec. 20.
112. Ibid., sec. 21.
113. Boone v. Reynolds, 1 S. & R. 231 (Pa. 1814).

The award having been filed with the prothonotary, it becomes his duty to enter it of record in the proper docket.[114] From the moment the award is entered of record, it has the effect of a judgment,[115] though no formal judgment is entered.[116] Under the Act of 1840,[117] an award entered of record acts as a lien upon the real estate of the losing party for a period of five years only, unless revived as other judgments are revived.

Grounds for Setting Aside the Award. Section 26 of the Act of 1836 provides that the courts may set aside awards upon due proof:

"I. That the arbitrators misbehaved themselves in the course of the hearings before them."

"II. That the award was procured by corruption, or other undue means."

The following statement from the opinion of the Supreme Court in the case of *Walls v. Wilson*[118] distinguishes the grounds for setting aside an award in compulsory arbitrations as contrasted with voluntary arbitrations:

"Under the voluntary arbitration law an award may be set aside if the arbitrators misbehave themselves in the case, or if they commit a plain mistake in matter of fact or matter of law, or if the award is procured by corruption or other undue means; but under the compulsory arbitration act the remedy of setting aside the award is confined to cases of misbehavior in the arbitrators, and to cases where the award is procured by corruption or undue means. A plain mistake in law or in fact can only be remedied by appeal."

Thus it appears that a motion to set aside an award will lie only for misbehavior of the arbitrators or when fraud and corruption have been practiced in procuring the award. The same standards in compulsory arbitration are applied by the courts in determining misbehavior of the arbitrators, and corruption and undue means, as are applied in voluntary arbitrations. Since these matters have been previously discussed,[119] there is no need for further comment.

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114. Act of 1836, sec. 23.
115. Ibid., sec. 24.
116. Spang v. Mattes, 253 Pa. 101, 97 (1916).
117. Act of April 21, 1840, P.L. 449, sec. 1.
118. 28 Pa. 514 (1857). Also see Wynn v. Bellas, 34 Pa. 160 (1859).
119. See supra, under voluntary arbitration when no action is pending, pp. 57-58.

The Appeal from the Award. Errors of law and of fact may be corrected by appeal.[120] Likewise, where the parties agree that the award shall be binding and no appeal shall be taken, if the lower court without right should strike off the award, such improper action of the court could be corrected by an appeal.

In order to take an appeal, the appellant must take an oath that such appeal is "not for the purpose of delay, but because he firmly believes that injustice has been done."[121] The appeal must be taken within twenty days after the award has been entered on the docket. Furthermore, the appellant must pay all costs which have accrued at the time of the appeal. These costs, of course, are recoverable if the appeal is sustained.[122] Once an appeal has been entered, it cannot be withdrawn without the written consent of the appellee. In the event that an appeal is not entered within twenty days from the date of entry of the award, it becomes the duty of the prothonotary if so requested to issue a writ[123] of execution. No execution can be lawfully issued until the expiration of the twenty-day period.[124]

There are certain general provisions[125] in the Act of 1836 concerning the powers and duties of arbitrators applying to all statutory forms of arbitration which should be briefly mentioned. The arbitrators have the power:

" I. To require from either party the production of all such books, papers and documents as they may deem material to the cause.

" II. To judge of the competency and credibility of witnesses, and the propriety of admitting any written evidence that may be offered.

"III. To administer oaths or affirmations to witnesses.

"IV. To adjourn their meetings from day to day, or for a longer time, and also from place to place, if they think proper.

" V. To decide both law and fact that may be involved in the case submitted to them."

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120. Supra, note 118.
121. Act of 1836, sec. 27.
122. Ibid., sec. 32.
123. Act of 1836, Sec. 34.
124. Woods v. Conner, 6 Pa. 430 (1847).
125. Act of 1836, sec. 40.

The Obstacles to Common Law and Statutory Arbitrations in Pennsylvania Prior to 1927.

Under Common Law. The chief obstacles to arbitrations under the common law are:

1. There is much uncertainty concerning the revocability of agreements to arbitrate. Some decisions have held that all agreements to arbitrate are revocable before an award has been rendered; others hold that where the arbitrators are named in the agreement their authority cannot be revoked. Some courts hold that an agreement to arbitrate a future dispute is absolutely revocable, while others hold that such is not the case where the arbitrators are named in the agreement.

2. In an arbitration conducted under the common law the award merely becomes the basis for an action at law. In other words, suit must be instituted upon the award in order to reduce it to a judgment. Since a speedy settlement is one of the prime objects of commercial arbitration, this advantage is frequently lost in common law arbitrations.

3. At common law if the arbitration were not definitely specified in the agreement to arbitrate, the courts would not lend their assistance to compel the defaulting party to select his arbitrators nor would they permit anyone else to select arbiters for him. Such an attitude assisted parties to break their agreements.

In Statutory Arbitrations. The defects in statutory arbitrations are:

1. The agreement to arbitrate must contain a provision for making it a rule of court, else it is revocable.

2. In the voluntary types of statutory arbitration, the arbitrators must be named. Where not named in the agreement, the courts will not supply a means for naming them.

3. The awards may in some types be appealed for error of law or fact.

4. There were no statutory provisions prior to 1927 concerning the arbitrament of future disputes.

5. The provisions of the statutes had to be strictly followed or else their benefits were denied by the courts.

In 1926 the writer made a survey[126] to determine the extent to which commercial arbitration was used[127] throughout the State of Pennsylvania and also to determine the opinions of attorneys concerning the defects in the arbitration law. Two main sources were used in obtaining the information. The one involved reports received from the prothonotary in each county concerning the extent to which both common law and statutory types of arbitration had been used over a considerable period of time. Their reports were based upon a careful examination of the various court dockets and the information was apparently quite reliable. The second source which the writer used was a detailed questionnaire sent to 450 attorneys practicing in the various counties. Care was used in selecting attorneys who were senior members of the bar so as to receive the benefit of their long experience. Replies were received from slightly over 85 per cent of the attorneys and, in many instances, they not only filled in the questionnaire, but also sent letters giving their own opinions on arbitration as well as criticism of the legal machinery then provided for arbitration.

Briefly, these sources revealed that at various times in the past, arbitration had been resorted to frequently, but that in recent years it was seldom used.

One of the chief criticisms of the attorneys was that, since an award could be appealed on the ground of mistake of fact, more time was consumed than if the cause were litigated. Another point of criticism was that evidence presented at the arbitration hearing lost its effectiveness if the award was set aside and the case had to be subsequently litigated. The frequency with which appeals were taken also added greatly to the cost of settlement. Still another objection raised was that no opportunity was provided by the statutes whereby arbitrators could obtain assistance from the courts concerning legal points.

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126. A copy of this report is on record at the offices of the American Arbitration Association, 521 Fifth Avenue, New York City, N. Y.

127. See infra, p. 111, for a discussion of the extent to which arbitration was used prior to 1927.

In many instances attorneys expressed the opinion that a new statute was necessary if arbitration was to play a part in the settlement of disputes. The following are some of the suggested requirements of such a statute:

1. That provision be made for arbitration of future disputes.

2. That the arbitrators need not be named in the agreement to arbitrate.

3. That the controversy need not be in court before arbitration can be undertaken.

4. That appeals be limited to those which can be taken from a judgment rendered in court.

5. That a method be provided whereby arbitrators may be selected in the event one of the parties refuses to appoint as provided in the agreement.

6. That opportunity be given whereby the arbitrators may receive instruction from the courts upon legal questions involved in the cause.

There can be little doubt that commercial arbitration, under the common law and under statutory provisions, had fallen into disuse because of the lack of proper legal sanction.

That a need existed for providing effective procedure for arbitration through legislation cannot be questioned. To accomplish this end, the Pennsylvania State Chamber of Commerce, the Philadelphia Chamber of Commerce, the American Arbitration Association, prominent industrial leaders, attorneys and business organizations generally, started to work. The result was the Sterling Bill which was introduced in the Pennsylvania State Legislature in its 1927 session. The bill was passed by the Legislature and was signed by Governor John S. Fisher on April 25, 1927, when it became a law. A careful study of the provisions of this act[128] is essential and will follow in the next chapter.

128. Act of April 25, 1927, P.L. 381, No. 248.

CHAPTER III

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CHAPTER III

The Pennsylvania Arbitration Act of 1927

The Act in Relation to a System of Uniform Arbitration Acts.

There has been a tendency for some years to adopt uniform laws among the several states. This has been evidenced by the passage of the Uniform Negotiable Instruments Act, the Uniform Sales Act, the Uniform Stock Transfer Act and others. In like manner the movement has spread to the adoption of a Uniform Arbitration Act among the states. The purpose of uniform arbitration legislation has been to accomplish two results. First, to obtain legislation in all states which would provide a satisfactory method to enforce arbitration in contracts containing an arbitration clause. In other words, to make an arbitration agreement irrevocable, and to provide an effective method for enforcing it. Second, to obtain a uniform system of procedure for arbitration cases throughout the states.

Various unsuccessful attempts were made over a course of years to obtain the passage of such legislation. These attempts, however, bore fruit in 1920, when the state of New York passed the *Walton Martin Act.*[1] To the united effort of the American Arbitration Association, the New York State Chamber of Commerce and the New York Bar Association should go the credit for the accomplishment of the passage of this piece of legislation. With the barrier broken, the success of the movement spread. Largely as a result of the efforts of the American Arbitration Association and the New York State Chamber of Commerce, the states of Arizona,[2] California,[3]

1. New York, Laws of 1920, Ch. 275.
2. Arizona, Revised Code 1928, Sec. 4294-4301, as amended by Laws 1929, Ch. 72 Sec. 1-4.
3. California, Code of Civil Procedure, 1923, Ch. 225, as amended by Assembly Bill No. 460.

Connecticut,[4] Louisiana,[5] Massachusetts,[6] New Hampshire,[7] New Jersey,[8] Oregon,[9] Pennsylvania,[10] and Rhode Island[11] have also adopted arbitration laws which are uniform, comprehensive and provide an effective method for the enforcement of agreements to arbitrate.

Inasmuch as commercial transactions are frequently between persons residing in different states, a need has long been felt for a federal act dealing with the subject of arbitration. Until recently there has been no law authorizing the arbitration of matters pertaining to interstate commerce and maritime transactions. In 1925 such an act[12] was passed as a result of the efforts of the American Arbitration Association, the New York Chamber of Commerce and the American Bar Association.

The Constitutionality of the Uniform Arbitration Acts.

The constitutionality of the New York Arbitration Act was attacked in the case of *In re Berkovitz et al. v. Arbib & Houlberg, Inc.*[13] In that case the parties entered into an agreement to arbitrate prior to the passage of the Arbitration Act, but the dispute did not occur until after the Act had become effective. One of the parties refused to submit to arbitration on the ground that the agreement to arbitrate was revocable under the common law of the state, and that the Arbitration Act being passed after the formation of the contract could not be applied. Furthermore, it was contended that the Arbitration Act was unconstitutional. The lower court overruled these contentions whereupon an appeal was taken to the Court of Appeals of the State of New York, where the judgment of the lower court was sustained. The objections raised to the constitutionality of the Act, and the manner in which the Ap-

4. Connecticut, Public Acts 1929, Ch. 65, Sec. 1-19.
5. Louisiana, Laws of 1928, Act No. 262, Sec. 1-18.
6. Massachusetts, Laws of 1925, Ch. 294.
7. New Hampshire, Public Laws of 1926, Ch. 358, as amended by Laws of 1929, Ch. 147.
8. New Jersey, Laws of 1923, Ch. 134.
9. Oregon, General Laws of 1925, Ch. 186.
10. Pennsylvania, Act of April 25, 1927, P. L. 381, No. 248.
11. Rhode Island, Acts and Resolves 1929, Ch. 1408, Sec. 1-18.
12. 43 Stat. 883 (1925), U. S. C. Tit. IX.
13. 230 N. Y. 261, 130 N. E. 288 (1921).

pellate Court answered the objections should be briefly noted in passing. They were:

(1) That statute was assailed as inconsistent with Article I, Sec. 2, of the Constitution of the State (of New York) which secures the right of trial by jury.

The court answered this contention as follows:

"The right is one that may be waived . . . It was waived by the consent to arbitrate. We are told that the consent must be disregarded as illusory, because the parties could not be held to it till this statute was adopted. A consent, none the less, it was, however deficient may once have been the remedy to enforce it. Those who gave it, did so in view of the possibility that a better remedy might come. They took the chances of the future. They must abide by its vicissitudes."

(2) The statute was assailed as abridging the general jurisdiction of the Supreme Court, which Article 6, Sec. 1 of the Constitution of the State (of New York) continues unimpaired.

To answer this argument the court stated:

"Jurisdiction exists that rights may be maintained. Rights are not maintained that jurisdiction may exist. The people, in establishing a Supreme Court to administer the law, did not petrify the law which the court is to administer . . . The Supreme Court does not lose a power inherent in its very being when it loses power to give aid in the repudiation of a contract, concluded without fraud or error, whereby differences are to be settled without resort to litigation. For the right to nullify is substituted the duty to enforce."

(3) Finally, the statute was said to violate Article 1, Sec. 10, of the Constitution of the United States, on the ground that it impaired the obligation of a contract.

The court said in answer to this contention:

"There is no merit in this contention. The obligation of the contract is strengthened, not impaired."

In the case of *Red Cross Line v. Atlantic Fruit Company*,[14] the Supreme Court of the United States passed upon the validity of certain phases of the New York Arbitration Act. In that case, likewise, the constitutionality of the Act was upheld.

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14. 264 U. S. 109 (1924).

The constitutionality of the Pennsylvania Arbitration Act of 1927 has not been passed upon by the courts. There are two phases of the Act, however, which call for discussion from the standpoint of their constitutionality. These points will be discussed presently[15] under the validity of arbitration agreements, provided for by the Act. A discussion of the various sections of the Act is essential.

The Provisions of the Pennsylvania Arbitration Act of 1927

The Title. The Arbitration Act of 1927 is entitled,

"An act concerning arbitration and to make valid and enforceable written provisions and agreements for the arbitration of disputes in certain contracts, including contracts to which the State or any municipal subdivision thereof may be a party, regulating the procedure under such provisions and agreements, and conferring certain powers and imposing certain duties upon the courts with reference thereto."[16]

Section 1. The Validity of Arbitration Agreements. Section 1, of the Act of 1927 provides:

"Validity of Arbitration Agreements. Be it enacted, &c., That a provision in any written contract, except a contract for personal services to settle by arbitration a controversy thereafter arising out of such contract or out of the refusal to perform the whole or any part thereof of an agreement in writing between two or more persons to submit to arbitration any controversy existing between them, at the time of the agreement to submit, shall be valid, irrevocable and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract."

Two types of agreements to arbitrate are provided by this section: 1. Agreements to arbitrate future disputes; 2. Agreements to arbitrate existing disputes.

For both types of agreements, the following provisions apply:

(a) There must be an agreement of the parties to submit to arbitration. Thus, the statute may be said to provide for voluntary arbitration and not for the compulsory type.

(b) The agreement to arbitrate must be in writing. Thus, an oral agreement to arbitrate would not be governed by the pro-

15. Infra, p. 81-87.
16. Pennsylvania Act of April 25, 1927, P. L. 381, No. 248.

visions of this section. In cases where an oral agreement is involved the courts will be called upon to treat it under the rules applicable to arbitrations at common law.

(c) Agreements to arbitrate disputes of either type, when in writing are "valid, irrevocable, and enforceable, save upon such grounds as exist in law or in equity for the revocation of any contract." Thus, arbitration agreements are placed upon the same plane as other types of contracts, in so far as their revocability is concerned. The confusion existing in the common law and under prior statutes in regard to revocability is thus removed.

(d) The arbitration agreements need not provide for a rule of court, nor does the act require or even mention the necessity for such a rule. This signifies that the case is not originally within the purview of the courts as under the former statutory types.

Personal Service Contracts Excepted. A certain difference is evident in the provisions of this section concerning the arbitrament of future disputes as contrasted with existing disputes. In the first type the parties may provide for the settlement by arbitration of a dispute arising out of any contract, except one for personal services. In the second type the parties are authorized to submit *any* controversy existing between them. Therefore, where the dispute is existing at the time of the agreement, even though it involves a matter of personal services it apparently may be the subject of a binding agreement to arbitrate; but, a provision to arbitrate a dispute which *may* arise out of a personal service contract is excepted from the benefits of this Act.

The exception made to arbitration clauses in personal service contracts has caused some doubt to be expressed concerning the constitutionality of the section. Those who raise this question base their contentions on the grounds the exemption of personal service contracts from other types of contracts may stamp the Act as a piece of special legislation which is prohibited by the Constitution of this State.

Article III, Section 7, of the Constitution of Pennsylvania provides:

"The General Assembly shall not pass any local or special law . . . regulating the practise or jurisdiction of or changing the rules of evidence in, any judicial proceeding or inquiry before courts, . . . arbitration, masters in chancery, or other tribunals . . . etc."

In order to determine what constitutes a special law resort must be had to the decisions of the courts. A search of the cases has revealed none that is strictly in point with the provision in the Act of 1927. There are many Supreme Court cases, however, which have held that the legislature may pass laws which only apply to a certain class of persons or things so long as the "classification" is proper and reasonable.

In the case of *Commonwealth v. Mentz*[17] the court made the following statement:

"Classification based on genuine and substantial distinction is within the constitutional power of the legislature; and an act which applies to all the members of a properly designated class is general and not special."

The following statement of the Pennsylvania Supreme Court in the case of *Laplacca v. Philadelphia Rapid Transit Company*[18] is also significant:

"Under these rules for certain purposes, such as the regulation of their rights and duties, members of particular trades, professions, or occupations may be properly classified, if reasonable and proper and founded upon a real and not merely an artificial distinction between members of that class and the general public."

The courts maintain that the ultimate determination of the "reasonableness" of such legislation resides with them. As a result the Supreme Court may be called upon in the future to determine this matter.

Aside from the question of the constitutionality of such a provision, its reason for insertion is interesting. The original draft of the bill introduced into the legislature did not contain the provision for exemption of contracts for personal services. The writer was present and testified in behalf of the bill at the hearing before the Judiciary General Committee. At this hearing serious opposi-

17. 19 Pa. Super. Ct. 283 (1902).
18. 265 Pa. 304, 108 Atl. 612 (1919).

tion was encountered to the bill from representatives of organized labor. As anyone who has had experience in labor controversies knows, there are times when even the suggestion of arbitration to representatives of organized labor is comparable to waving "the proverbial red flag." Much effort was expended in trying to convince the above mentioned representatives as well as certain members of the Committee itself that the statute would only become operative in personal service cases if the parties themselves *agreed* to arbitrate beforehand. And, furthermore, that to specifically exempt such contracts would prevent parties who really desired the benefits of the statute from being able to attain them. No amount of explanation would overcome the resistance, so it was finally agreed to insert the exception to avoid serious chances of not obtaining the passage of the bill.

Legality of Arbitration in Fire Insurance Policies. Another question concerning the constitutionality of the Arbitration Act of 1927 has been raised in connection with policies of fire insurance. Attention was first focused upon the point by the court in the case of *Van Sickle v. Insurance Company*,[19] although the question was not raised in the pleadings. The most satisfactory method of dealing with this question is to quote the following from the opinion of the court in that case:

"The constitutionality of the Arbitration Act in so far as applicable to actions brought on insurance policies, might be seriously questioned, on the ground that it violates Art. 1, Sec. 6 of our constitution of 1873, which provides that 'trial by jury shall be as heretofore, and the right thereof remain inviolate.'

"The Legislature may authorize voluntary arbitration, without the right of appeal, but not compulsory arbitration. Cutler v. Richley, 151 Pa. 195, 199.

"The Legislature passed the Insurance Code of May 17, 1921, P. L. 682, 733-740, making mandatory the inclusion in every policy against fire the appraisal or arbitration provision in question. Our Supreme Court held that this provision was to be construed merely as a contractual and not a statutory obligation; and that, as such, it was revocable, and deprived neither party of his right of trial by jury. Gratz v. Ins. Co., 282 Pa. 224; Chauvin v. Ins. Co., 283 Pa. 397. Then the Legislature, by its enactment of the General Arbitration Act, provides that this provision shall not hereafter be construed as revo-

19. 9 Wash. 14 (Pa. 1928).

cable, but especially enforceable; and that such issues as are comprised by such arbitration clauses must hereafter be determined without a jury.

"We know that it might well be argued that such contractual obligations are voluntarily entered into; and this is true in the same sense that one eats of his own volition; he might elect to die. The insured does voluntarily what he is compelled by law to do. The act denies the would-be insured the right to enter into an otherwise legal contract, unless he first forfeits his constitutional right to trial by jury."

The decision of this court of Common Pleas raises a very nice legal point. Briefly stated it suggests that the Act of 1927 may be unconstitutional, in so far as it applies to arbitration clauses in fire insurance policies. The reason stated is that since the Insurance Code of 1921 compels the insertion of an arbitration clause in a policy of fire insurance and provides no appeal from the award, such statutory provision would be unconstitutional were it not for the fact that the courts in such cases have held the arbitration clause to be a contractual obligation, and, therefore, revocable. Then the Act of 1927 is passed which makes such clauses irrevocable, and therefore this court reasons that the parties have been deprived of their right to trial by jury without their consent, which is a deprivation of their constitutional right, so the Act of 1927 is therefore unconstitutional when applied to arbitration clauses in fire insurance policies.

The writer, with due respect to the court, suggests that the reasoning in the opinion is somewhat questionable. In order to determine this question a careful analysis must be made of the following: The compulsory provisions of the Act of 1836; the case of *Cutler v. Richley*,[20] the Acts of 1870, P. L. 948 and 1873, P. L. 396 interpreted by *Cutler v. Richley;* the Insurance Code of 1921, P. L. 682; the case of *Gratz v. Insurance Company*,[21] and the Act of 1927.

The Act of 1836 provides that either party may enter a rule of reference compelling his adversary to submit the dispute then pending in court to arbitrators, even though the parties never agreed to

20. 151 Pa. 195 (1892).
21. 282 Pa. 224 (1925).

arbitrate the dispute. The act provides that an appeal may be taken from the award by either party. The constitutionality of this act is cited many times by the courts. The reason that it has not been declared unconstitutional is because there is no deprivation of the right to trial by jury since an appeal may be taken from the award. This constitutionality of this compulsory arbitration act lays the foundation for the reasoning of the writer.

The case of *Cutler v. Richley*[22] interpreted the arbitration acts, namely the Act of 1870, P. L. 948 and the Act of 1873, P. L. 396. The Act of 1870 (applying only to Erie County) provided that the parties by mutual consent might submit a dispute existing between them to a legal arbitrator for settlement. The errors of the legal arbitrator were to be corrected by means of a writ of error, but no right to take an appeal was granted. A writ of error only permits the questions of law to be reviewed, while an appeal opens to inspections both questions of law and questions of fact. This Act was held valid because the parties to a voluntary arbitration agreement may waive their right of appeal. The legislature then passed the Act of 1873 (also applying only to Erie County) which repealed the voluntary provisions of the Act of 1870 and gave either party the right to compel the other to submit a dispute to arbitration even though no agreement to arbitrate had been entered into. This Act of 1873 made no change in the provisions for correction of error in awards, as provided by the Act of 1870, so only a writ of error could be taken and not an appeal. The Supreme Court held the Act of 1870 as amended by the Act of 1873 to be unconstitutional as it provided for compulsory arbitration, without the right of appeal. It is submitted that this was a correct decision.

The Insurance Code of 1921[23] provides that a clause providing for the determination of loss by arbitration must be in all policies of fire insurance entered into in this state. It also provides that no appeal shall lie from an award. This provision was undoubtedly unconstitutional if the courts had interpreted it strictly, because it would have deprived the parties of their right to trial by jury since

22. 151 Pa. 195 (1892).
23. Pennsylvania, Laws of 1921, P. L. 682.

if they entered into a contract of fire insurance they were forced to arbitrate, and no appeal was allowed.

The constitutionality of the act was saved by the decision in the case of *Gratz v. The Insurance Company*. In this case[24] the Supreme Court held that the agreement to submit the question of the amount of loss by fire, to arbitration was not binding upon the parties, but was revocable by them. This was in line with their prior decisions which held agreements to arbitrate future disputes to be revocable. Since the agreement to arbitrate was revocable, there was no deprivation of the right of trial by jury as either party could refuse to be bound by the arbitration clause, and was, therefore, free to bring an action in a court of law.

Then the legislature passed the Arbitration Act of 1927, which provided that an arbitration clause in any contract was irrevocable. But care should be taken to observe that the Act gives the absolute right to appeal. Furthermore, the Act of 1927 provides the procedure which must be followed by the parties in arbitrating a dispute under a voluntary arbitration clause in a written contract. It also provides that all prior arbitration statutes which are inconsistent are repealed.

It would, therefore, seem that the Act of 1927 would overrule the decision in the *Gratz* case, and make an arbitration clause in a fire insurance policy *valid, binding and irrevocable*. Since the Act of 1927 applies to such clauses, because they provide for arbitration as a part of a written contract (i. e. the insurance policy), does it not follow that the other provisions of the Act of 1927 should likewise apply to a case to which the act is applicable? It certainly would seem so, and that being true, the provision in the Insurance Code providing for no appeal from the award would be superseded by the provision in the Act of 1927 permitting an appeal from a judgment rendered on an award. Therefore, even though the parties are compelled to agree to arbitrate the amount of loss, if they desire to enter into a fire insurance contract, yet, since the provisions of the Act of 1927 appear to apply, they are afforded a right of appeal and it would follow that they have not been de-

24. 282 Pa. 224 (1925).

prived of a constitutional right any more than such a deprivation has been committed under the compulsory provisions of the Act of 1836.

If the writer's reasoning is sound upon this matter, too much importance should not be given to the above decision in the case of *Van Sickle v. The Insurance Company.* This is a matter for the Supreme Court of this state to determine when a proper case involving the question is brought before it.

The writer desires to raise another query in connection with this doubt raised in the Van Sickle case concerning the constitutionality of the Act of 1927. If the Act of 1927 applies to the Insurance Code of 1921 as the court in the *Van Sickle* case seems to think, it does, and if one of these acts must be declared unconstitutional, why select the Arbitration Act of 1927, and not the Insurance Code? It would appear to the writer as above stated that there is no reason for any unconstitutionality, but if one must be held unconstitutional, then it would seem that the act providing the compulsion without an appeal (i. e. the Insurance code) would call for revision, and not the one providing for an appeal (i. e. the Arbitration Act of 1927). Like the prior question, a decision of the Supreme Court is necessary to afford a final answer.

Even though the Supreme Court should hold the Act of 1927 to be unconstitutional in regard to arbitration clauses in fire insurance policies, it can be safely stated that only clauses in this type of contract will be affected, because of the provision in section 19 of the Act which states that "if any part of this act shall be declared to be invalid or unconstitutional, the remaining parts thereof shall be and remain the valid act of the Legislature." This saving clause may actually be of considerable importance in the future if other nice questions are raised.

Section 2. Stay of Proceedings in Violation of Arbitration Agreement. The following is the provision of Section 2 of the Act of 1927:

"If any suit or proceeding be brought upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such

suit or proceeding is referable to arbitration under such an agreement, shall, on application of one of the parties, stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

The provisions of Section 2 afford a method by which one of the parties to an agreement to arbitrate may prevent the other party from bringing an action at law upon a dispute which he has agreed to arbitrate. The preventative method afforded takes the form of an application to the court in which the suit has been brought to stay the legal proceedings therein until the arbitration has been held. This method supplants the common law rule wherein a party to a *general* arbitration agreement could avoid the agreement by bringing an action upon the dispute in a court of law.

However, before the court will order such a stay of proceedings it will inquire into two questions: First, did the parties agree to arbitrate this dispute? Second, is the party requesting the stay of proceedings in default? The phrase "in default" means that such party was requested to arbitrate after the dispute had arisen but refused. If he has had his opportunity to submit to arbitration, but has not taken advantage of it, then he is deemed to be "in default."

If the answer to the first question is in the affirmative, and the answer to the second is negative, then the courts are required under this section to stay the proceedings. By this method the party who is alleging damages for breach of the contract must abide by the agreement to arbitrate, and submit the dispute to the arbiters or else he will have no opportunity to obtain satisfaction since the courts will stay the action in the court of law until the arbitration has been concluded.

In the case of *Bushford v. West Miami Land Co.*[25] the Supreme Court decided that under this section where parties to an executory land contract agreed to submit a matter to arbitration in the event that the purchaser's attorney was unable to accept title, the parties

25. 295 Pa. 560, 145 Atl. 678 (1928).

were bound by their agreement to arbitrate, and the vendor could not seek redress elsewhere although the arbitrators were not named in the agreement. After this decision, there can be no doubt that the failure to name the arbitrators in the agreement will not defeat the rights of either party to enforce the arbitration. The common law rule is, therefore, supplemented by the provision of this act.

Section 3. Remedy in Case of Default — Jurisdiction — Petition and Notice — Hearing and Proceedings. This section provides that:

"The party aggrieved by the alleged failure, neglect or refusal of another to perform under a written agreement for arbitration may petition the Court of Common Pleas of the county having jurisdiction for an order to show cause why such arbitration should not proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by law for the service of a summons. The court shall hear and determine the matter upon the petition and answer, and depositions, or after hearing of the parties in open court, as the court may determine, and the court, upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not at issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. If the making of the arbitration agreement or the failure, neglect or refusal to perform the same be at issue, the court shall proceed summarily to the trial thereof. If a jury trial be waived by the parties, the court shall hear and determine such issue, or if a jury trial be not waived, the court shall direct that a jury trial of such issue shall be had at the earliest possible date. If the jury or the court, if a jury trial be waived, find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury or the court, if a jury trial be waived, find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof."

Under section 2 provision was made for a stay of proceedings where one party in disregard of his agreement to arbitrate had commenced an action at law upon the dispute. Section 3 deals with cases in which one of the parties refuses to arbitrate, and the other party desires that the disputes be arbitrated. In this situation a stay of proceedings would not be sufficient, and, therefore, the aggrieved party is provided with a means for compelling the

arbitration. The means provided takes the form of an order from the court directing that the parties proceed with the arbitration in accordance with the terms of their arbitration agreement.

To obtain such a court order the aggrieved party must petition the Court of Common Pleas for an order to show cause why the arbitration should not proceed in the manner provided for in the agreement. It is necessary that the party in default be served with notice of petition at least five days before the date set for the hearing of the petition.

Apparently a petition for the enforcement of an arbitration agreement is limited to courts of common pleas in Pennsylvania. It is imperative, therefore, that a petitioner must secure service of his petition within the State in order to bring the matter within the jurisdiction of a Pennsylvania court. Where the arbitration agreement is made with a non-resident, service may be had upon the person of the non-resident if such person can be served while within the State of Pennsylvania. If the party upon whom the petition is to be served is a non-resident corporation, service may be made upon the registered agent of such corporation in the State of Pennsylvania.

The court must determine the same two questions at the hearing, as previously discussed, where a motion for stay of proceedings was requested, namely, was the agreement to arbitrate validly entered into, and is the aggrieved party innocent of default? If neither of these points are in issue, and if the court is satisfied concerning them, then it should order the parties to proceed with the arbitration. If, however, either of these points are in issue, then the court may proceed summarily to a trial of the same. However, if either party demands a jury trial of such issue, then the court shall direct that such trial shall be had at the earliest possible date. In either case if the results show that the agreement was not validly entered into, or that the aggrieved party is in default, then the court will order that the parties be freed from their obligation to arbitrate. In the event that the results of the trial show that the agreement was valid, and that there has been no default by the petitioner, then it is the duty of the court to order the arbitration to proceed in accordance with the terms of the agreement.

By the provisions of this section, one of the glaring defects of common law arbitration procedure is corrected. It is now possible to compel the arbitration as agreed upon. At common law the courts refused to order the arbitration to proceed. In like manner the provisions of this section also afford a remedy to the party who is contesting the arbitration, in case the agreement is not a valid agreement or in case the party who has taken out the rule has been at fault, and therefore, is not deserving of the proceeding.

The parties to a contract involving interstate or foreign commerce may provide for arbitration of disputes arising out of such contract in accordance with the provisions of the Federal Arbitration Act. In such case recourse to the Federal Courts will be available to the parties. Likewise, where a dispute arises between two parties, residents of different states, and they desire to submit it to arbitration, it is desirable that they draw the agreement to arbitrate in accordance with the provisions of the Federal Act. In order that the assistance of the Federal Courts may be obtained, if the dispute does not arise out of a maritime transaction, nor out of a contract involving interstate or foreign commerce, the amount in controversy must involve the sum of $3,000 or more.

Section 4. The Method for the Appointment of the Arbitrators. Section 4 provides as follows:

"If in the agreement provision be made for a method of naming or appointing arbitrators or an umpire, such method shall be followed, but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of arbitrators or an umpire or in filling a vacancy, or if any such arbitrators be disqualified to sit, then, upon the application of either party to the controversy, the court shall designate and appoint arbitrators or an umpire as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein, and, unless otherwise provided in the agreement, the arbitration shall be by a single arbitrator. If one of the arbitrators dies, or if for any reason becomes incapacitated after a partial submission of the matter in controversy to the arbitrators, then, unless the parties agree to proceed with the remaining arbitrators, if any, or to proceed by adding a new arbitrator to fill the vacancy, the said arbitration shall be considered void and of no effect and the parties shall proceed ab initio."

If the arbitration agreement provides a method of naming or appointing the arbitrators, it is the one to be followed. In the event that no method is provided for in the agreement, or if the parties cannot agree as to who the arbitrators shall be, the court, upon application of either party, is empowered to designate the persons to act as arbiters. In this event, unless otherwise provided for in the agreement, the court is empowered to name one arbitrator who shall conduct the hearing and make the award. In case one or more arbitrators die, or are disqualified, before the submission of the case, and the parties cannot agree how to fill the vacancy, then the court is entitled to name the person or persons to fill the same. If one of the arbitrators dies, or if for any reason becomes incapacitated after a partial submission of the matter in controversy, then unless the parties agree to proceed with the remaining arbitrators, or agree upon arbitrators to fill the vacancy, the arbitration shall be considered void and the parties must proceed *ab initio*. Certainly this provision does not mean that the agreement to arbitrate is void and the parties freed to litigate. The more reasonable interpretation is that the matters submitted must be resubmitted to the new panel of arbitrators. It is suggested that the parties may avoid the trouble and cost of a second presentation of evidence by providing in the agreement their desire that the remaining arbiters may determine the cause or provision may be made for the appointment of a new arbitrator, who shall proceed with the others from that point onward.

This section is very helpful in the enforcement of an agreement to arbitrate, as it provides an efficient method of naming arbitrators in the event one party refuses to perform his duty. Under the rules of the common law, and also under the voluntary arbitration laws, there were no means provided to compel a party to proceed with an arbitration, unless the arbitrators were definitely named in the agreement. Furthermore, it is not always advantageous to name an arbiter, in the agreement, without a knowledge of the type of dispute that may arise. Therefore, the effect of this section is extremely helpful.

If the parties do not look with favor upon the method provided by the Act for the selection of arbitrators, they may outline their

own method in the agreement, and the courts will enforce it. To insure the selection of persons who will have a thorough knowledge of the subject matter of the contract as well as a thorough knowledge of trade practices to act as arbitrators, provision may be made in the arbitration agreement for the selection of arbiters from the panel of arbitrators established by leading trade associations in the industry involved.

Section 5. Court to Make Rules. Section 5 provides as follows:

"The respective Court of Common Pleas shall have the power to make and adopt rules concerning procedure and practice under this act as shall seem to them proper, except that no rule shall make any provision contrary to the express provisions of this act."

This section gives the respective courts of common pleas the power to make and adopt rules concerning the procedure and practice under this act as they shall deem proper. However, no rule can be made contrary to the express provisions of this act. The writer is somewhat doubtful about the advantage to be gained from this section. It does not seem to obtain uniformity throughout the state as would be gained if a definite set of rules were adopted for the entire state. It is hoped that in practice confusion will not result.

That some definite set of rules of procedure is necessary cannot be doubted. To include such a set in the submission makes that instrument cumbersome, and often may not produce favorable results due to the lack of experience of the parties in knowing how to provide for an efficient system of procedure. To prevent this result, it is suggested that the parties may provide that the arbitration rules and procedure of a reliable trade association shall be followed. So long as these rules are not inconsistent with any rules of court in effect, the courts will enforce the arbitration according to the adopted rules. There is little danger that the trade association rules will be inconsistent with the provisions of the Act of 1927, although they may differ somewhat from them. Frequently parties may find that such trade rules furnish the solution to their problem.

Section 6. Method for Compelling the Attendance of Witnesses and the Manner in which Testimony is to be Taken. The provisions of Section 6 are as follows:

"When more than one arbitrator is agreed to, all the arbitrators shall sit at the hearing of the case, unless by consent in writing all parties agree to proceed with the hearing with a less number. The arbitrators selected either as prescribed in this act or otherwise may summon in writing any person to attend before them or any of them as a witness, and in a proper case to bring with him or them, any book, record, document or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses in courts of general jurisdiction. The summons shall issue in the name of the arbitrators and shall be directed to the said person, and shall be served in the same manner as subpoenas to appear and testify before the court. If any person or persons so summoned to testify shall refuse or neglect to obey said summons upon petition, the Court of Common Pleas of the county in which such arbitrators are sitting may, upon proof to the court that the testimony is proper, and that the witness could be compelled to appear under existing law had the action been an action at law, compel the attendance of such person or persons before said arbitrators or punish said person or persons for contempt in the same manner now provided for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of this State.

"All testimony shall be taken under oath or affirmation as is now provided in suits at law and shall, at the request of either party or the arbitrators, be taken stenographically and made a part of the record."

The arbitrators are empowered to summon, in writing, any person to attend before them as a witness, and in a proper case, to bring along any book, record or document, which may be deemed material as evidence in the case. The summons is to issue in the name of the arbitrators, and is to be served in the same manner as a subpoena to appear and testify before a court. In the event that any person so summoned refuses to obey, upon a petition to the court of common pleas of the county in which the arbitrators are sitting, the court, upon proof that the testimony is proper and necessary, may compel the attendance of such person before the arbitrators or punish such person for contempt of court. This section also provides that the fee of a witness attending an arbitration proceeding shall be the same as the fee of a witness in a court of general jurisdiction.

A further provision of this section stipulates that when more than one arbitrator is agreed to by the parties, all the arbitrators must attend the hearing, unless by consent in writing the parties agree to a smaller number. This provision definitely specifies that all the arbitrators must attend and clears up a point that led to confusion under both the rules of the common law and the previous arbitration acts.

This section also provides that all testimony must be taken under oath or affirmation, and shall, at the request of either party, or the arbitrators, be taken stenographically and made a part of the record. It seems to the writer that it might have been better to have left the matter concerning the necessity of an oath to the parties to decide. From information obtained from trade associations, it seems that the parties often desire to waive the formality of an oath. As the act now reads, it is error if the oath is not administered to each witness.

Section 7. When Deposition May Be Taken. Section 7 provides as follows:

"Upon petition approved by the arbitrators, the court may direct the taking of depositions on behalf of any party, to be used in evidence before the arbitrators in accordance with existing law in respect to depositions."

If a party petition the arbitrators to permit the taking of testimony of one or more witnesses by means of a deposition, and the petition is approved, the courts may then direct the issuance of the neccessary deposition. The arbitrators do not have the authority to take depositions without being petitioned by the parties to the agreement. Upon the return of the deposition, properly taken, the evidence contained therein may be considered by the arbitrators in the same manner as juries are permitted to consider such information in trials before a court of law. A distinct saving in both time and expense is made possible by this provision.

Section 8. The Award. Section 8 provides:

"The award shall be in writing and shall be signed by the arbitrators, or a majority of them, and a signed copy delivered to each party to the arbitration. If there be more than one arbitrator, an award shall require the concurrence of a majority of the arbitrators, but unanimous concurrence shall not be necessary unless there be less than three arbitrators."

In order that the award may be valid, it must be in writing and signed by a majority of the arbitrators. In case there is more than one arbitrator, an award requires the concurrence of a majority of the arbitrators, but unanimous concurrence is not necessary unless there are less than three arbitrators. It is also necessary, in order to have a valid award, that a signed copy be sent to each party to the arbitration. There has been some conflict in the decisions of this state as to the number of arbitrators that had to concur before a valid award could be rendered, but under this act this point cannot arise.

It should be noted that the time for filing of an award is not fixed by the Act. In order to prevent possible delay, the parties should provide for this matter in their agreement. If this is done, the court will enforce such provision.

Section 9. Motion to Confirm Award — Jurisdiction — Notice. The provisions of Section 9 are as follows:

"At any time within one year after the award is made any party to the arbitration may apply to the court having jurisdiction for an order confirming the award, and thereupon the court shall grant such an order unless the award is vacated, modified or corrected as prescribed in the next two sections. Notice in writing of the application shall be served upon the adverse party or his attorney five days before the hearing thereof."

At any time within one year after the award has been rendered, any party to the arbitration may apply to the court having jurisdiction for an order confirming the award. The court is duty bound to confirm the award unless an application has been made to vacate, modify or correct it, as prescribed in the next two sections. Where such application has not been made, the court must confirm the award, without the exercise of any discretion. The party desiring the confirmation must serve notice upon the adverse party at least five days before the date set for the hearing. It is advisable to present proof of such service at the hearing. This section makes it necessary for the party in whose favor the award has been made to confirm it within a year from the date of its rendition, and thereby conclude the issue. Before the passage of this act, it was possible for an award to drag along for an indefinite period before an effort was made to have it enforced.

It is noteworthy that awards rendered under the provisions of this act do not *ipso facto* have the effect of judgments, nor can they be entered by the prothonotary as such. It is necessary that the proper courts shall pass upon their validity before they acquire the effect of a judgment. It should be recalled that awards at common law likewise did not have the effect of judgments, but it was necessary to bring an action at law with the award as the basis. Under the prior statutory provisions the award could be entered as a judgment upon its rendition. This was due to the fact that the case was already in court under a "rule of court." It should, therefore, be observed that the provisions of the Act of 1927 provide a new method.

Section 10. Motion to Vacate Award — Grounds — Rehearing. Section 10 provides as follows:

"In either of the following cases the court shall make an order vacating the award upon the application of any party to the arbitration:

(a) Where the award was procured by corruption, fraud or undue means.

(b) Where there was evident partiality or corruption on the part of the arbitrators or any of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceed their powers or so imperfectly executed them that a final and definite award upon the subject matter submitted was not made.

Where an award is vacated, and the time within which the agreement required the award to be made had not expired, the court may, in its discretion, direct a rehearing by the arbitrators."

Under the provisions of this section, it is necessary that the party desiring the award vacated must make application to the court; otherwise, the court is not authorized to vacate the award, but must confirm it if the winning party has applied for confirmation.

It is submitted that the grounds for vacating awards are reasonable and proper. It is certainly to be desired that an award procured by fraud, corruption or undue means produced by either

of the parties or by the partiality or corruption of the arbitrators should not be binding upon an innocent party. Likewise, the unreasonable refusal to postpone a hearing for good and sufficient cause should invalidate an award. The very nature of an arbitration suggests a settlement of a dispute upon its merits. How can a dispute be settled upon that basis, if for good cause one party is unable to attend the hearing, and present his evidence? But great caution should be exercised by the arbitrators to ascertain if there is actual cause for requesting a postponement. Much harm can result from a too liberal grant of postponements. One of the primary reasons for arbitration is the advantage which it affords of a speedy settlement. The ease with which postponements are granted in some courts has been justly criticised. Therefore, arbitrators should take heed else a similar criticism may be levelled at them.

In like manner, parties if present at the hearing are entitled to have their evidence, which is pertinent to the cause, heard and justly considered by the arbitrators.

It is a well recognized and fundamental principle of arbitration that arbiters should not decide matters which are not submitted to them. The arbitrators are vested with their authority by the agreement of the parties, and, therefore, cannot lawfully make an award upon matters which they were never authorized to determine.

Certainty and definiteness are prime virtues of any award. Arbitrators are appointed to determine a matter in dispute, not to leave it, as they found it, uncertain and doubtful. Therefore, if the award is not final and definite it should be vacated.

The last provision of this section is also significant. It gives the court the right, at its discretion, to resubmit the dispute to the arbitrators. This right cannot be exercised where the parties have provided a certain time, and that time has either elapsed or there is not a sufficient portion of it remaining to permit a reasonable period for a rehearing of the case. In this connection, it should be noted that the act does not specify that the arbiters shall render an award within any given time limit, but it is lawful for the parties to provide such a limit in their agreement.

Section 11. Motion to Modify or Correct an Award — Grounds. Section 11 provides:

"In either of the following cases the court shall make an order modifying or correcting the award, upon the application of any party to the arbitration.

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matters submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

(d) Where the award is against the law and is such that, had it been a verdict of the jury, the court would have entered different or other judgment, notwithstanding the verdict.

The court may modify and correct the award or resubmit the matter to the arbitrators."

This section provides means and specifies the grounds upon which the courts themselves may modify or correct an award. It appears that all of the grounds provided are reasonable and proper. Some fear has been expressed that too much opportunity has been given to the court in this matter under paragraph (d). It is submitted that this fear is not warranted. The writer is of the opinion that when a motion to correct an award is before a court, it will not hear testimony nor attempt to review facts on their merits. However, the court will examine the record to ascertain whether or not there are supporting facts upon which the award is based, to the same extent only that it would in the case of a jury verdict. There is no apparent reason why an award should receive different treatment than a verdict of a jury.

Section 12. Judgment Upon Award. Section 12 provides:

"Upon the granting of an order confirming, modifying or correcting an award, judgment shall be entered in conformity therewith in the court wherein the order was granted."

Upon the granting of an order confirming, modifying or correcting an award, judgment is to be entered by the court in which the

order upon the award was made. Upon the rules of the common law, it was necessary for the party in whose favor the award was rendered to start an action in court to have the award made a judgment. This situation meant the delay necessitated by awaiting a turn upon the trial list. Under the new act the motion for confirming the award is heard upon the next motion day, and if confirmed, judgment is immediately entered by the court.

Section 13. Notice of Motions When Made — Service — Stay of Proceedings. Section 13 provides as follows:

"Notice of a motion to vacate, modify or correct an award shall be filed in the prothonotary's office of the court in which the application is made, and to be served upon the adverse party or his attorney within three months after the award is filed or delivered, as prescribed by law for service of notice of a motion in an action. The court may in all proper cases, upon the filing of the motion, grant a stay of proceedings pending the determination of the motion."

A notice of a motion to vacate, modify or correct an award must be filed in the prothonotary's office of the court, and a copy of this notice served upon the adverse party within three months from the date the award was filed. In all proper cases the court is empowered to grant a stay of proceedings pending the determination of the motion.

The provisions of this section prevent a dissatisfied party from appealing after three months has elapsed from the rendition of the award. The purpose of these provisions is to secure a speedy determination of the case. It would seem that the period might have been made shorter, thus accomplishing this purpose even more speedily, without working any substantial injustice on the dissatisfied party.

Section 14. Record — Filing — Judgment — Effect and Enforcement.

"Any party to a proceeding for an order confirming, modifying or correcting an award shall, at the time such order is filed with the prothonotary for the entry of judgment thereon, also file the following papers with the prothonotary:

(a) The agreement, the selection or appointment, if any, of an additional arbitrator or umpire, and each written extension of the time, if any, within which to make the award.

(b) The testimony if taken stenographically.

(c) The award.

(d) Each notice, affidavit or other paper used upon an application to confirm, modify or correct the award, and a copy of each order of the court upon such an application.

The arbitration shall be docketed in the prothonotary's office as if it were an action at law in the prothonotary's office, with the moving party as plaintiff and the other parties as defendant or defendants.

The judgment so entered shall have the same force and effect in all respects as and be subject to all the provisions of law relating to a judgment in an action at law, and it may be enforced as such in accordance with existing law."

The purpose of this section is to provide adequate means for the recording of all necessary papers employed in the arbitration proceeding so that a complete record of the case will be available in case of an appeal. Incorporated in this section is the provision that a judgment obtained in an arbitration is just as effective as a judgment obtained in any action at law, which, of course, means that it is a lien upon the property of the party against whom it is entered. It may also be enforced by writ of execution as similar judgments at law are enforced.

Section 15. Appeals. Section 15 provides as follows:

"An appeal may be taken from an order confirming, modifying, correcting or vacating an award, or from a judgment entered upon an award in accordance with the existing law in respects to appeals to the Superior and Supreme Court."

This is the usual provision for an appeal from an order of a common pleas court. This is additional evidence that awards are considered on the same basis as verdicts of a jury.

Section 16. State and Municipal Contracts. Section 16 provides:

"The provisions of this act shall apply to any written contract to which the Commonwealth of Pennsylvania or any agency or sub-division thereof or any municipal corporation or political division of the Commonwealth shall be a party."

The provisions of this act apply to any written contract to which the Commonwealth of Pennsylvania or any sub-division thereof or any municipal corporation of the Commonwealth is a party. This section is important as it provides a means whereby the Commonwealth of Pennsylvania may be compelled to arbitrate a dispute arising out of a contract containing an arbitration clause, if it is a party thereto. Before the passage of this act the Commonwealth could not be compelled to live up to an arbitration agreement unless the Attorney General consented.

Section 17. Application for Declaratory Judgments. The provisions of Section 17 are as follows:

"The arbitrators or the parties to the arbitration, with the approval of the arbitrators, shall have the right to apply to the court at any time during the arbitration proceedings for the determination of any legal question in accordance with the terms of the Uniform Declaratory Judgments Act. Such an application, however, shall not operate as a stay of proceedings unless the said arbitrators consent to such stay of proceedings."

This section provides that the arbitrators or the parties to the arbitration with the approval of the arbitrators have the right to apply to the court, at any time during the arbitration proceedings for the determination of any legal question in accordance with the terms of the Uniform Declaratory Judgments Act.[26] An application of this nature, however, does not operate as a stay of proceedings unless the arbitrators give their consent.

This section was made a part of the Act in order to permit the parties or the arbitrators to obtain the benefit of the legal knowledge of the courts upon questions of law which are not clear to the arbitrators. Many appeals upon errors of law may be prevented if the wisdom of the courts is sought by the arbitrators. Under this section the desire of the parties themselves is not sufficient to have legal questions determined by the courts, as the phraseology of the section provides that the approval of the arbitrators must be had in order to take advantage of the Uniform Declaratory Judgments Act. The reason for the required approval of the arbitrators in such a case is evidently the fact that an ap-

26. Pennsylvania, Act of June 18, 1923, P. L. 840.

peal is allowed under section 11 (d) in case an error of law was made by the arbitrators. If section 11 (d) had been omitted, it appears to the writer that it might have been possible to have an award vacated under section 10 (c) if the arbitrators arbitrarily refused to permit a question of law to be referred to the courts. The language of Section 10 (c) is quite strong as is evidenced by the following quotation:

"the court shall make an order vacating the award upon the application of any party to the arbitration," for "any other misbehavior by which the rights of any party have been prejudiced."

Section 18. Definitions. Section 18 provides:

"Whenever the word arbitrators is used in this act, it shall mean a single arbitrator, if there be but one, or at least a majority of the arbitrators if there be more than one.

Except as otherwise specifically indicated, all references in this act to the courts are to be construted to mean the Common Pleas Courts of the county having jurisdiction of the parties or the subject matter. If, prior to the award, any Court of Common Pleas shall have entertained any motion in respect to said arbitration, such court shall retain jurisdiction, and all subsequent proceedings shall be filed in said court. If there be no proceedings prior to the award, the arbitrators may in the award designate the county in which subsequent proceedings shall be had. If the arbitrators fail to designate such county, and there shall have been no prior proceedings, the moving party may proceed in the county in which (a) the arbitrators made their report, or (b) the county in which the other party resides or has an office, or (c) the county in which the court would have had jurisdiction if an action had been instituted originally in respect to the subject matter of the arbitration."

The enforcement of the provisions of this act is limited to the courts of common pleas of Pennsylvania, subject, of course, to the right of appeal. The parties are prohibited from going into more than one court. There should be much care used by the arbitrators in designating the county in which future court proceedings shall be carried on.

Section 19. Inconsistent Acts Repealed — Time of Taking Effect — Application. Section 19 provides as follows:

"All acts and parts of acts inconsistent with this act are hereby repealed, and this act shall take effect upon its enactment, but shall not apply to

contracts made prior to the taking effect of this act. If any part of this act shall be declared to be invalid or unconstitutional, the remaining parts hereof shall be and remain the valid act of the legislature."

This section provides that the Act should take effect upon its enactment which was April 25, 1927, the day that Governor John S. Fisher signed it. The Act, however, has no application to any contract made prior to April 25, 1927.

This Act does not specifically repeal any prior act in force at the time the act went into effect. It merely repeals all prior acts and parts of acts inconsistent with it. Where such a general repealer clause is found in a statute no absolute statement can be made with any degree of certainty as to what previous acts are inconsistent, and thereby repealed. The final determination of matters of this kind lies with the Supreme Court. Opinion, however, may be expressed, after careful study, as to what former acts probably were intended to be repealed.

The Effect of the Arbitration Act of 1927 upon the Previous Law.

The writer will attempt to point out the effect of the Act of 1927 upon the law as it existed prior to present enactments. For this purpose comparisons will be made with: (1) the provisions of the common law; (2) the compulsory arbitration provisions of the Act of 1836; (3) the voluntary arbitration provisions for pending actions of the Act of 1836; (4) the voluntary provisions for arbitration of questions of fact in pending actions; (5) the voluntary arbitration provisions of existing disputes under the Act of 1836.

(1) *The Effect upon the Common Law.* Apparently the Act of 1927 supersedes the common law provisions for arbitration in all cases where the agreement to arbitrate is written except in disputes arising out of a contract for personal services. It specifies that such agreement shall be valid, binding and irrevocable, and then goes on to make provisions for procedure to be followed in carrying out the arbitration. It is applicable to the settlement of future disputes as well as existing disputes. It does not require that the arbitrators be named. Therefore, since the new Act makes these provisions, it clearly supersedes the inconsistent principles of the common law which have been previously applied by the

courts to written agreement to arbitrate. As was previously stated,[27] written agreements to arbitrate existing and future disputes were irrevocable at any time prior to the award, if the arbitrators were not named in the agreement. There was, however, considerable confusion and conflict concerning the revocability of agreements to arbitrate future disputes even with the arbitrators named. That group of common law cases making written agreements to arbitrate either existing or future disputes revocable is superseded by the provisions of the Act of 1927, under which they are held irrevocable.

Since the Act of 1927 applies only to written agreements to arbitrate, it is thought that the common law decisions will still be applicable in cases where the agreement to arbitrate is oral.

Undoubtedly the courts in the future will follow prior common law decisions on such points as, what constitutes fraud, corruption, partiality of the arbitrators as well as cases which have decided points concerning the definiteness of awards, cause for postponements, and like matters. Since the Act of 1927 does not define all terms, prior decisions on these matters will remain the law.

(2) *The Effect upon Provisions for Compulsory Arbitration Under the Act of 1836.* The Act of 1927 clearly only applies to voluntary arbitrations. It provides for those cases in which the parties have provided in writing for the settlement by arbitration of existing or future disputes. The Act of 1836 provides a method for compulsory arbitration in actions pending in court. It was observed[28] that in the cases provided for under that act no agreement of the parties was necessary. Therefore, it would appear that the provisions of the Act of 1927 are in no manner inconsistent with those of the compulsory sections of the Act of 1836. They deal with different types of arbitration, and, therefore, cannot be inconsistent with each other. It may, therefore, be concluded that the provisions for compulsory arbitration under the Act of 1836 are still in effect.

(3) *The Effect upon Provisions for Arbitration of Pending Actions under the Act of 1836.* The Act of 1836 provides that the

27. See supra, pp. 41 and 44 et seq.
28. See supra, p. 65.

parties may agree to submit a dispute, which is then pending in an action in court, to arbitrators, if there has been a mutual consent to a rule of court.[29] Although this act provides for an agreement of the parties to submit the dispute to arbitrators, there is something more intended, namely that they consent to a rule of court.

It would appear that if the parties included in their agreement to arbitrate a provision for ordering a rule of court that they intended to arbitrate under the provisions of the Act of 1836, and not of the Act of 1927. Where, however, an agreement to arbitrate a dispute, which is then pending in a court of law, does not provide for the issuance of a rule of court, the provisions of the Act of 1927 would seem to apply. It is submitted, therefore, that the provisions of the Act of 1927 are not inconsistent with those of the Act of 1836 and therefore, the Act of 1836 applies in the above type of case.

(4) *The Effect upon the Provisions for the Arbitrament of Questions of Fact in Pending Actions under the Act of 1836.* As previously discussed,[30] the Act of 1836 provides that the parties may agree to arbitrate any question of fact arising in a pending action, if they also stipulate for the issuance of a rule of court. These provisions, like those discussed under (3), result from an agreement to arbitrate plus a provision for the issuance of a rule of court. Such an agreement falls within a similar category as the agreement in (3), and the same reasoning should apply. Therefore, if the parties provide in an agreement for the submission of questions of fact arising in a pending action to arbitrators and also provide for the issuance of a rule of court, the provisions of the Act of 1836 should be applied. If, however, no rule of court is provided for, then the Act of 1836 should be applied. There appears to be no inconsistency in the provisions of the Act of 1836 and the Act of 1927 regarding this type of arbitration although there is a difference.

(5) *The Effect upon the Provisions for Voluntary Arbitration of Existing Disputes under the Act of 1836.* In order to obtain

29. See supra, p. 61.
30. See supra, p. 61.

the benefits of the provisions of the Act of 1836 concerning the arbitrament of existing disputes, it is necessary that the parties agree to submit their controversy to named arbitrators, and to provide in the agreement for the issuance of a rule of court. Since this provision, like all the above provisions of the Act of 1836, requires something in addition to the written agreement to arbitrate, namely a rule of court, it would appear not to be inconsistent with the Act of 1927, although different in its provisions. It might well be said to provide for a different type of submission to arbitration, rather than a different procedure for the same type. This is so because the provision for a rule of court gives the courts jurisdiction before any of the procedural steps are taken, while under the Act of 1927, it is not the intention that the aid of the courts be solicited until after the award has been rendered. Thus it would seem that the acts provide for a different type of arbitration, but are in no sense inconsistent.

A summary of the conclusions concerning the effect of the Act of 1927 upon the common law, and prior statutory provisions for arbitration may be briefly stated as follows: In written agreements to arbitrate disputes, other than those arising out of personal service contracts, the former common law decisions are superseded by the Act of 1927 except where they determine questions which are not specifically defined by the Act of 1927, but merely mentioned in a general way. In written arbitration agreements, which provide for a rule of court, the intention of the parties should be construed to provide for a submisson under the Act of 1836 which does not appear to be inconsistent with the Act of 1927. In pending actions, either party may by rule of court order the other to arbitrate the dispute, without a previous agreement to this effect, and the compulsory provisions of the Act of 1836 will govern since they do not appear to be inconsistent with the provisions of the Act of 1927. There can be no certainty that the Supreme Court of this state will follow the same line of reasoning adopted by the writer; therefore it is necessary to await their future decisions in these matters.

The writer may state with some degree of certainty that the Act of 1927 has provided an effective method of procedure for the

enforcement of agreements to arbitrate both future and existing disputes, and has done so in a manner which will not afford the courts an opportunity for saying that such agreement may be revoked at the will of either party.

CHAPTER IV

The Extent to Which Statutory Arbitration is Used in Pennsylvania

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CHAPTER IV

The Extent to Which Statutory Arbitration Is Used in Pennsylvania

In 1926 the writer conducted a survey of commercial arbitration for the American Arbitration Association, to determine the extent to which arbitration was used in the State of Pennsylvania. The results of that survey[1] showed that except for the use made of arbitration in various trade associations, it was seldom employed. The survey did reveal, however, that twenty years prior to that date the statutory provisions were resorted to quite frequently in many counties. Then gradually, year by year, arbitration fell into almost complete disuse except in a few counties.

The reason, as previously stated,[2] was that the risks involved in agreeing to arbitrate were too great for the benefits that might accrue. Arbitration fell into bad repute as more time and expense might be consumed than if the case was litigated.

The Extent of the Use of Statutory Arbitration Since the Passage of the Act of 1927.

It is interesting to see the effect of the passage of the Arbitration Act of 1927 upon the use of arbitration in this State. The writer has obtained information from fifty counties concerning the number of motions for confirmation of awards which have been filed since the passage of the new act through the first half of 1930. The following table shows the number of motions for confirmation of awards which have been filed during a period of three years:

1. Supra, p. 72, n. 126.
2. Supra, p. 73.

TABLE I

Number of Motions for Confirmation of Awards in Pennsylvania From 1927 to 1930

County	Number of Motions to Confirm Awards
Adams	0
Allegheny	102
Armstrong	0
Beaver	0
Bedford	0
Berks	0
Blair	0
Bradford	0
Bucks	0
Butler	0
Cambria	0
Cameron	0
Carbon	0
Center	0
Chester	12
Clarion	36
Clearfield	0
Clinton	0
Columbia	0
Crawford	0
Dauphin	0
Delaware	8
Erie	3
Fayette	0
Franklin	0
Greene	0
Huntingdon	0
Indiana	56
Juniata	0
Lackawanna	38
Lancaster	5
Lawrence	0
Lehigh	6
Luzerne	32
Lycoming	7
McKean	0
Mifflin	0
Monroe	0

County	Number of Motions to Confirm Awards
Montgomery	0
Montour	0
Northampton	25
Perry	0
Philadelphia	0
Pike	0
Potter	0
Snyder	0
Somerset	0
Union	0
Wayne	0
Westmoreland	0

This table clearly indicates that arbitrations under the provisions of the Act of 1927, have not occurred frequently throughout the State. In but twelve of the fifty counties have motions to confirm awards been entered. However, it is not to be understood that there were no arbitrations conducted in other counties, nor that all arbitrations were represented by the number of motions to confirm in those counties in which such motions were entered. Several reasons exist for this statement. First, in some instances the losing party complied with the award before a motion to confirm it became necessary. Second, a number of arbitrations are conducted under the rules of trade organizations and the awards in these cases are generally obeyed by the losing party without the need for assistance from the courts to enforce them. The rules, regulations and functions of such trade bodies will be discussed hereafter.[3]

Comparison of the Extent to which Statutory Arbitration Was Used Before and After 1927.

One should not lose sight of the fact that the Arbitration Act of 1927 has been in force for a period of less than four years. In this connection, it is interesting to compare the number of statutory arbitrations conducted in the twelve counties in the period since the new Act with a similar period immediately preceding its adoption.

3. Infra, pp. 119-149.

TABLE II

A Comparison of the Motions to Confirm Awards for a Three-year Period, Before and After the Act of 1927

County	Number of Motions to Confirm Awards Prior to Act of 1927	Number of Motions to Confirm Awards Since the Act of 1927
Allegheny	11	102
Chester	0	12
Clarion	9	36
Delaware	0	8
Erie	2	4
Indiana	6	56
Lackawanna	153	38
Lancaster	1	5
Lehigh	0	6
Luzerne	23	32
Lycoming	4	7
Northampton	3	25

These comparisons show a healthy increase in the number of motions to confirm awards. In every instance, there has been an increase in the use of statutory arbitration in each of the eleven counties compared, with the exception of Lackawanna, where the number decreased 76 per cent.

The Effect of a Reduction of Delay in Litigation Upon the Use of Statutory Arbitration.

The reason for the large decrease in the use of statutory arbitration in Lackawanna County has been explained by the Prothonotary of that County. It seems that in 1927 the trial list in the Common Pleas Court of Lackawanna County was two and a half years in arrears. Much criticism resulted from this condition. In an endeavor to eliminate this delay Judge Leach, the presiding member of the Court, succeeded in bringing about a change in the number and length of the terms of court. Formerly the Court had conducted six terms, each of two weeks duration, in a year. This was changed to five terms, each of three weeks duration. Thus, the court was in session for an additional period of three weeks each year. Furthermore, under the former system fifty cases were assigned for trial each week while under the new system one hun-

dred cases are assigned. Another important change was made in regard to continuances. The court had formerly been quite lax in granting the right to have a case continued until a future term. Under the new plan it is quite difficult for attorneys to obtain a continuance, without convincing the court that good reasons exist.

The changes made in Lackawanna County have resulted in bringing the trial list to within one term of being up to date. This is an example of what a court may accomplish in eliminating delay if it earnestly sets itself to that purpose. The elimination of delay has had a striking effect upon the number of statutory arbitrations, which have been conducted in the County. It has resulted in a material reduction in the number, due evidently to the fact that the parties may obtain a trial of their case within a period of from two to four months. Furthermore, this decrease in the use of arbitration tends to indicate that one of the most important reasons for seeking arbitration is to avoid the delay of litigation. As previously indicated[4] a decrease in the delay incident to litigation might have considerable effect upon the expediency of commercial arbitration or any other method as an alternative to litigation. Other courts might profit from the experience of the Lackawanna Courts and make serious effort to reorganize and expedite their system of procedure.

The Type of Statutory Provisions Likely to be Used in the Future.

Each of the motions made to confirm awards in the above mentioned counties since 1927 has been made under the provisions of the Act of 1927. This is significant as it shows that the recent Act is more suitable to those desiring to arbitrate than the previous Acts. The writer feels that the arbitration provisions of the prior statutes will be resorted to rarely, now that a more effective system exists. As time goes on more people will become acquainted with the provisions of the Arbitration Act of 1927 and those who desire a more speedy method for adjusting their disputes may find its provisions useful. The Act of 1927 affords a very satisfactory method of arbitration especially for those who do not have access to a trade tribunal.

4. Supra, p. 11.

Before the use of arbitration will become extensive in Pennsylvania business men throughout the State must be informed of the status of arbitration agreements and the opportunities which exist for its use. The passage of an effective arbitration statute established a sound legal status for arbitration but in itself could not create a wide spread use.

The Attitude of the Bar Toward Arbitration.

Another factor preventing the use of arbitration is the attitude of the legal profession toward its use. The writer interviewed a number of prominent attorneys in Philadelphia to ascertain their opinion of the reasons for the comparatively slight use of arbitration by the legal profession. The following are the reasons which they gave:

1. A lack of general knowledge by the Bar concerning the recent arbitration statutes.
2. A habit of dealing with the courts.
3. Fear of the costs of arbitration, as no statute fixes the fees of the arbitrators.
4. Tendency on the part of some arbitrators to compromise rather than to settle a dispute upon its merits.
5. Impossibility for an arbitrator named by a party to avoid either of two vicious extremes:
   a. He will be an advocate of the side that appoints him, or
   b. He will lean too far in the other direction in an effort to be impartial.
6. Arbitration procedure is devoid of technicalities and, therefore, lawyers feel that its use will lessen the need for their services.
7. A lawyer with a weak case would rather trust his client's case to a jury than to an arbitrator.
8. A defendant debtor is not prone to submit his cause to a speedy settlement by arbitration; — delay favors his cause.

Many of these objections are not serious. In fact, some are complementary to the effectiveness of arbitration. The future use of arbitration would be greatly stimulated by a more friendly attitude of the Bar toward it.

CHAPTER V

The Use of Commercial Arbitration by Trade Associations and Exchanges

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TABLE III

AN ANALYSIS OF THE METHODS, PROCEDURE AND USE OF COMMERCIAL ARBITRATION IN FORTY PENNSYLVANIA TRADE ASSOCIATIONS

Name of Industry	Name of Association	Type of Member	Number of Members	Per Cent of Industry by number	Per Cent of Industry by volume of business transacted.	Arbitration provided for disputes between members.	Arbitration provided for disputes between members and non-members.	Arbitration — Voluntary or Compulsory	Formal Arbitration Rules	Standing Arbitration Committee	By whom are Arbitrators Chosen	Are Arbitrators Members of Trade	Can Award be Appealed	To whom Appeal is Taken	Are Awards Generally Appealed	Are Members Satisfied with Arbitration in General	Has number of Disputes Decreased	Is Standard Contract Used	Does Standard Contract Contain Arbitration Clause	Number of Cases Arbitrated in 1929.
Advertising	Outdoor Advertising Assn. of Penna.	Manufacturers	56	90	95	Yes	Yes	Voluntary	Yes	No	Board of Directors	Yes	Yes	To Directors of Assn.	No	Yes	No	No	No	3
Building Trades	Associated Pennsylvania Constructors	Contractors	—	—	—	Yes	Yes	Voluntary	Yes	No										
	Building Material Dealers Assn.	Retailers	200	50	60	Yes	Yes	Voluntary	Yes	Yes	President	Yes	Yes	Appeals Committee	No	Yes	Yes	Recommended	No	6
	Building Owners' and Managers Assn. of Phila.	Owners and Managers	76	75	80	Yes	No	Voluntary	No	No	Disputants	Yes	Yes	Directors of Assn.	No	Yes	—	No	No	4
	Philadelphia Building Congress	All groups in Industry	—	—	—	Yes	Yes	Voluntary	Yes	No	Disputants	Yes	No		No	Yes	Yes	Not compulsory	Yes	0
	Philadelphia Heating and Plumbing Contractors	Contractors	46	8	—	Yes	Yes	Voluntary	Yes	Yes	Disputants	Yes	No		—	Yes	Yes	Yes	Yes	4
	Western Penna. Sand and Gravel Assn.	Mfrs., Wholesalers and Retailers	4	10	—	Yes	No	Voluntary	No	No	Disputants	Yes	No		No	Yes	Yes	No	No	0
Commerce—Transportation	Pennsylvania Bus Association	Owners	98	30	40	Yes	No	Voluntary	No	Yes	President	Yes	Yes	Directors of Assn.	No	Yes	Yes	No	No	0
	Philadelphia Maritime Exchange	All Shipping Interests	286	—	—	Yes	No	Voluntary	Yes	No	Disputants	Yes	No		No	Yes	Yes	No	No	0
	Penna. State Telephone and Traffic Assn,	Telephone Companies	150	25	—	Yes	Yes	Voluntary	Yes	Yes	Board of Directors	Yes	No		—	—	Yes	Yes	Yes	0
Coal	Philadelphia Retail Coal Conference	Retailers	—	—	—	Yes	Yes	Voluntary	No	No	Disputants	Yes	No		—	—	—	No	No	0
Decorative Trade	Decorative Trade Assn.	Wholesalers	13	25	—	Yes	No	Voluntary	No	Yes	President	Yes	No		—	Yes	Yes	No	No	12
Drugs	Philadelphia Assn. of Retail Druggists	Retailers	1,200	75	—	Yes	Yes	Voluntary	No	No	Disputants	Yes	No		—	Yes	Yes	No	No	12
Financial	Eastern Beauty and Barbers Credit Assn.	Jobbers	65	50	—	Yes	Yes	Voluntary	Yes	Yes		Yes	Yes		No	?	Yes	No	No	100
	Philadelphia Stock Exchange	Brokers	206	—	—	Yes	Yes	Voluntary	Yes	Yes	Board of Governors	Yes	Yes	Board of Governors	No	Yes	—	—	—	4
	Retail Merchants Credit Assn.	Retailers	127	25	60	Yes	Yes	Voluntary	Yes	Yes	President	Yes	Yes	Board of Directors	Yes	Yes	Yes	No	No	2
Food	Central Penna. Bakers Assn.	Manufacturers	40	75	—	Yes	Yes	Voluntary	No	No	Disputants	Yes	No		No	Yes	Yes	No	No	3
	Penna., New Jersey & Delaware Wholesale Grocers Assn.	Wholesalers	75	60	—	Yes	Yes	Compulsory	Yes	No	National Wholesale Grocers Assn.	Yes	No		No	Yes	Yes	Yes	Yes	3
	Retail Grocers Assn.	Retailers	450	60	—	No	Yes	Compulsory	Yes	No	Association	Yes	No		—	Yes	Yes	Yes	No	8
	Western Penna. Bakers Assn.	Mfrs. and Wholesalers	18	85	—	Yes	No	Voluntary	No	No	President	Yes	No		—	Yes	Yes	No	No	1
	Wholesale Fish Dealers Protective Assn. of Phila.	Wholesalers	29	95	80	Yes	Yes	Voluntary	Yes	Yes	President	Yes	No		—	Yes	Yes	No	—	5
Grain and Feed	Commercial Exchange of Phila.	Wholesalers and Jobbers	336	90	95	Yes	Yes	Compulsory	Yes	Yes	President	Yes	Yes	Appeals Committee	No	Yes	Yes	Yes	No	2
	Grain and Hay Exchange of Pittsburgh	Wholesalers and Jobbers	12	7	—	Yes	No	Compulsory	Yes	Yes	President	Yes	No		—	—	Yes	No	—	0
Laundry	Phila. Laundry Owners Exchange	Manufacturers	35	50	75	Yes	Yes	Voluntary	Yes	Yes	President	Yes	Yes	Association as a whole	No	Yes	Yes	No	—	20
Leather	Middle Atlantic Shoe Retailers Assn.	Retailers	355	5	—	Yes	Yes	Voluntary	Yes	Yes	President	Yes	Yes	Nat. Shoe Retailers Assn.	No	Yes	—	Yes	Yes	4
	Phila. Leather Belting Assn.	Manufacturers	13	90	85	Yes	Yes	Voluntary	No	No		Yes	No		—	Yes	Yes	Yes	No	1
Lumber	Retail Lumbermen's Assn. of Phila.	Retailers	—	—	—	Yes	Yes	Voluntary	Yes	Yes	President	Yes	No		No	Yes	Yes	No	—	5
	The Lumbermen's Exchange of Phila.	Mfrs., Wholesaler, Jobber, Retailer	130	50	—	Yes	Yes	Voluntary, Compul.	No	Yes	Directors of Assn.	Yes	No		No	Not all	Yes	No	—	2
Milk	Interstate Milk Producers Assn.	Dairy Farmers	20,000	75	80	Yes	Yes	Voluntary	Yes	Yes	Directors of Assn.	Yes	No		—	—	Yes	Yes	No	
	Phila. Milk Exchange	Dealers	28	80	75	Yes	No	Voluntary	No	No	Disputants	Yes	—		—	—	—	No	—	1
Nurseries	Penna. Nurserymen's Assn.	Growers, Wholesalers, Retailers	75	20	60	Yes	Yes	Voluntary	Yes	Yes	President	Yes	—		—	—	—	No	—	2
Paint—Oil—Varnish	American Paint and Varnish Mfrs. Assn.	Manufacturers	208	10	90	Yes	Yes	Voluntary	Yes	Yes	President	Yes	No		—	Yes	Yes	No	No	3
	Pittsburgh Paint, Oil and Varnish Assn.	Mfrs., Wholesalers, Retailers	44	85	90	Yes	Yes	Compulsory	Yes	Yes	President	Yes	Yes	National Assn.	No	Yes	Yes	Yes	—	0
Paper—Printing	Central Penna. Typothetae	Mfrs., Jobbers	28	25	95	Yes	No	Voluntary	No	No	Disputants	Yes	—		—	—	—	No	—	0
	National Paper Box Manufacturers Assn.	Manufacturers	400	—	—	Yes	No	Voluntary	No	No	Disputants	Yes	—		—	—	—	No	No	3
Real Estate	Philadelphia Real Estate Board	Brokers	400	25	35	Yes	Yes	Voluntary	Yes	Yes	President	Yes	Yes	Board of Governors	No	Yes	Yes	Yes	No	4
	Pittsburgh Real Estate Board	Brokers	650	70	80	Yes	Yes	Voluntary	Yes	Yes	President	Yes	Yes	Board of Governors	No	Yes	Yes	Yes	No	5
Slate	National Slate Assn.	Quarriers, Contractors, Jobbers	225	70	65	Yes	Yes	Voluntary	Yes	No		Yes	Yes	Board of Directors	No	Yes	Yes	Yes	Yes	15
Warehouse—Storage	Penna. Furniture Warehousemen's Assn.	Owners	60	35	75	Yes	Yes	Voluntary	Yes	Yes	President	Yes	No		—	—	—	Yes	No	0
Textile	Cotton Yarn Merchants Assn.	Jobbers, Commis. Merch.	35	90	85	Yes	Yes	Voluntary	Yes	Yes	President	Yes	Yes	Appeals Committee	No	Yes	—	Yes		—
	Philadelphia Kniteraft Guild	Manufacturers	10	25	30	Yes	Yes	Voluntary	No	No		Yes	No		No	—	Yes	No	No	0

CHAPTER V

The Use of Commercal Arbitration by Trade Associations and Exchanges

We shall now examine the facilities available for commercial arbitration in trade associations and exchanges in the State of Pennsylvania. Questionnaires were sent to over two hundred trade organizations throughout the State to ascertain the extent to which they had provided for the use of arbitration, and furthermore, to determine the extent to which it was being utilized by the members of such trade bodies.

An impression has commonly prevailed that arbitration is not extensively used in this State. As a matter of fact, in 1926 the writer surveyed the field and found that, although some trade organizations provided a system of arbitration, its use was almost negligible. A careful survey of the various trade associations in 1930 reveals a considerable increase in the number of associations which have established an arbitration system within their own organization. At the same time, however, it is noticeable that the existing facilities for trade arbitration are not being extensively utilized. It is necessary, therefore, to analyze the various systems and methods to ascertain, if possible, why they are not more frequently used.

The Methods, Procedure and Use of Commercial Arbitration in Forty Pennsylvania Trade Associations.

In order to condense this information, the following table has been prepared. In it the methods and procedure in forty trade associations have been classified.

TABLE III

The Methods, Procedure, and Use of Commercial Arbitration in Forty Pennsylvania Trade Associations

(See Folded Table Attached).

To evaluate the various arbitration systems, there are twenty points which should be considered. These points are covered in columns three to twenty-two, inclusive. A brief discussion of each of these points, as well as an analysis of trends found in this group of associations in connection with these points, is advisable.

1. *Type of Membership.* One of the most important factors in determining the success of any system of arbitration is its opportunity to operate effectively. A trade association cannot expect a system of arbitration to function when its membership includes only one group within a given industry, whose members compete with each other, but do not trade with each other. Commercial disputes, for which arbitration furnishes an effective method of settlement, generally arise out of breaches of contract. Consequently, commercial disputes do not ordinarily arise between two wholesalers in a given industry, because wholesalers rarely contract with each other. Their contracts are either with manufacturers or with retailers. Therefore, it would seem that in a trade organization including wholesalers alone, commercial arbitration would have little opportunity to function.

In analyzing the forty associations on this basis, it is found that thirty-one are composed of members limited to only one group in an industry, such as manufacturers, wholesalers, retailers, etc. Nine associations have a membership composed of two or more groups. Of the group of thirty-one above referred to, there are three whose membership is composed only of brokers. These three associations may well be placed with the nine whose membership is composed of more than one group, since they may enter into contractual relations with one another, as is customary in any brokerage transaction. This, however, leaves remaining in the first group twenty-eight associations whose membership is limited to one class only — for example, the National Paper Box Manufacturers Association whose membership is made up entirely of manufacturers. It rarely happens that one manufacturer of paper boxes enters into a contract with another manufacturer of paper boxes. Therefore, it follows that there would be but little need for an arbitration system in the association cited. Information received from the secretary of that organization reveals that their arbitration machinery has

never been used in its seven years of existence. This is merely an example of what one is likely to find concerning the use of arbitration in an association composed of members representing only one phase in the distribution process, especially where no provision is made for arbitration of disputes between a member and a non-member.

2. *Number of Members.* The number of members in a trade association is a factor which needs some consideration. Assuming the association to be constructed along proper line, with each group in the distribution process enrolled as member,—if the membership is small, it is probable that very few disputes may arise. This is especially true of a trade body which does not afford facilities for arbitration between its members and non-members. A good example of this type in the Grain and Hay Exchange of Pittsburgh which although its members do business with each other, it has but twelve members, or one per cent of the total jobbers in this commodity in the state and does not afford a system of arbitration for non-members. It is not surprising, therefore, to find that it conducted no arbitration during the year 1929.

3. *Per Cent of the Industry by Number as Represented by Membership in Trade Associations.* Although many of these trade organizations show quite a large per cent of the industry represented in their membership, this means very little in twenty-eight of the associations,—where the members are all within one group. It is quite desirable to have a large percentage of the industry represented in the membership of a given trade organization, because it is then possible to work out a series of accepted trade practices which will be recognized by the majority of the industry. This in turn makes it possible to build up certain standards by which the industry may be governed, and which will assist arbitrators in finding awards which will meet with the approval of the industry as a whole.

4. *Percentage of the Industry by Volume of Business Transacted as Represented by Membership in a Trade Organization.* The discussion and remarks in the preceding paragraph apply also to this section. A trade association may have a large percentage of the

industry represented in its organization,—in so far as number of members is concerned. However, if this number does not, also represent a large part of the volume of a given trade, its effectiveness as an instrument of arbitration may not be assured. In many cases the information concerning this element has not been available.

5. *Provision for Arbitration of Disputes Between Members.* The table shows that in every association listed, except one, some provision is made whereby members having disputes may secure arbitration, if they so desire. In some associations, as will be seen subsequently, a definite procedure is established; in others there is simply a provision that the president of the association may be called upon to select an arbitration board. The one association which does not provide arbitration for the settlement of disputes between its members is the Retail Grocers Association. This body, however, does provide its members with facilities whereby their disputes with non-members may be arbitrated. In fact, where a non-member petitions the arbitration committee for the settlement by arbitration of a dispute with a member, under the by-laws of the association the member is compelled to arbitrate. This may seem to be a very strange and peculiar rule but, in the judgment of the writer it is extremely sound. The reason is that this association, being composed solely of retailers who do not have contractional relations with each other, does not need a system of arbitration provided for disputes between its members, as none are likely to occur. But there are many opportunities for the occurrence of disputes between the retailer and the wholesaler, or between the retailer and the manufacturer. Therefore, a provision for the arbitration of such disputes is necessary and advisable. This organization has used sound judgment in establishing an arbitration system. Whether it is desirable to provide that the member is bound to arbitrate a dispute with a non-member, or should have the right to determine this matter for himself, is a question of opinion. A reference to column eighteen would indicate that the members are satisfied that such a method is desirable for their association.

6. *Provision for Arbitration of Disputes Between Members and Non-Members.* Thirty of the forty trade associations provide for

arbitration between members and non-members. Of the ten associations which do not make provision for this type of arbitration, it is found by reference to the last column of Table III that seven of these associations did not conduct an arbitration in 1929, while one organization conducted one arbitration. Of the thirty associations providing for arbitration between members and non-members, only six did not conduct an arbitration during the year 1929. This shows that where an arbitration system is provided for non-members who have disputes with members, the use of arbitration is more extensive. Of the ten associations which do not provide for non-member arbitration, five have a membership composed of only one group in the distribution process.

It may be said that, in order to insure a satisfactory system of arbitration, a trade association should make arbitration available to non-members who have trade disputes with members. This is especially true in the case of those associations which do not have a membership including all classes in the distribution process of a given industry. If the membership of an association is limited to wholesalers, and no provision is made for them to arbitrate disputes between its members and manufacturers or retailers, the arbitration system canont be expected to benefit the members, because there is no occasion to resort to its use.

7. *Provisions Made for Voluntary or Compulsory Arbitration.* Of the forty associations, thirty-four make provision for voluntary arbitration only, while six provide for the compulsory type. In thirty-four of the associations it is necessary that the parties to a dispute agree to submit same to arbitration. Having so agreed, they may then seek the assistance of their trade organization to procure a settlement by arbitration if they so desire. The association may have a definite form of procedure provided in its by-laws or constitution for conducting arbitration hearings. Likewise, a standing arbitration committee may be maintained, or a panel of arbitrators may be available, from which a selection may be made.

Of the six associations providing for compulsory arbitration, four provide that all disputes arising between members must be submitted to arbitration. These provisions are either a part of the by-laws

of the association or are named in a standard contract adopted by the association and required to be used by members. In the fifth association, namely the Lumbermen's Exchange, the Board of Directors determine whether or not a dispute between members should be arbitrated. For instance, where one member desires to arbitrate a dispute with another member, the matter is referred to the Board of Directors of the Exchange, who determine whether the arbitration should be compelled. In the sixth association, the Retail Grocers Association, there is no provision for arbitration between members, because no disputes are likely to arise within this group, since they are all retailers. However, arbitration is provided for the settlement of disputes between members and non-members. The disputants in such cases are bound to arbitrate if either party desires to do so.

In three of the six associations, — namely the Pennsylvania, New Jersey, and Delaware Wholesale Grocers Association; the Grain and Hay Exchange of Pittsburgh; and the Pittsburgh Paint, Oil and Varnish Association, the members are compelled to arbitrate disputes with other members, but are not compelled to arbitrate a dispute with a non-member.

Inside the trade association there may be a diversity of opinion concerning the desirability of provisions for compulsory arbitration. As has been observed, only fifteen per cent of the associations surveyed provide for this type of arbitrations. In this connection it is interesting to note that the great majority of English Trade organizations provide for compulsory arbitration; likewise, many of the most successful and best managed trade bodies in New York State. Compulsory arbitration provisions have been found to work very successfully in both instances.

The writer's personal opinion is that such provisions are advisable in industries where many disputes may arise from cancellations of orders, disputes as to quality, etc., especially where such disputes arise from mythical grievances rather than actual faults. For instance, where a sharp drop in the market price of a commodity may lead unscrupulous purchasers to claim defects in order to avoid a contract, — a provision compelling the parties to sub-

mit the dispute to skilled arbitrators has frequently been found to correct this abusive practice. Of course, the success of compulsory arbitration, depends largely upon the honesty, integrity, and skill of the arbitral tribunal, especially where no appeal is permitted. In making provision for compulsory arbitration associations should also exercise care in selecting a panel of arbitrators whose integrity and skill is of the highest order. It is not obligatory that members of a trade join an association providing for compulsory arbitration. If they do not desire to arbitrate their disputes under a compulsory system, they may refrain from joining such an association.

8. *The Policy of Trade Organizations Concerning Formal Arbitration Rules.* In twenty-six of the associations analyzed, formal arbitration rules of one kind or another are provided. In fourteen trade bodies no such rules exist. The arbitration rules provided vary in many respects. In some associations arbitration is provided for in the constitutions; in others in the by-laws. In some mere mention is made that disputes between members may be submitted to arbitration, while in others a complete system of procedure is drawn up as a part of the by-laws.

The Philadelphia Building Congress furnishes one of the best examples of a formal set of arbitration rules. This organization has formulated rules for its members which cover every important phase of a proceeding in arbitration. Provisions are made concerning the agreement to arbitrate, defaults under agreements, appointment and selection of arbitrators, vacancies, hearings, oaths of arbitrators, evidence, testimony, waiver of hearings, oaths, awards and appeals. These rules and regulations have been carefully revised so as to meet the requirements of the 1927 Arbitration Act. Another feature which this association provides is a panel of arbitrators selected from every group in the building industry.

This association includes nineteen affiliated organizations,—each representing a specialized field in the building industry. Every group has appointed five arbitrators to a panel of the Philadelphia Building Congress. The following list shows the trade bodies affiliated with the Building Congress:

American Institute of Architects, Philadelphia Chapter.

American Society of Civil Engineers, Philadelphia Chapter.

Associated Pennsylvania Constructors, Philadelphia Chapter.

Brick Manufacturers Association of Philadelphia.

Electrical Contractors Association, Inc.

Guild of Tile Craftsmen.

Hardwood Flooring Contractors Association.

Heating and Piping Contractors, Philadelphia Association.

Institute of Scrap Iron & Steel, Inc.

Marble Contractors Association.

Master House Painters and Decorators Association of Philadelphia.

Master Plasters Company of Philadelphia.

Master Stone Cutters Association.

Real Estate Board.

Roofing Contractors Association of Philadelphia.

Sash and Door Manufacturers Association.

Structural Steel Board of Trade.

The associations which do not have formal arbitration rules assist their members by suggesting that disputes be submitted to arbitration, and render assistance through the selection of arbitrators for the parties. The President and Secretary of the association usually assist in obtaining the consent of the parties to arbitrate, and in suggesting suitable persons to act as arbitrators.

9. *Standing Arbitration Committees.* In seventeen of the associations no provision has been made for a standing arbitration committee, while in twenty-three associations such a committee is available to settle disputes of the members. The Commercial Exchange of Philadelphia offers a good example of the type of provision usually made for a trade arbitral tribunal. The following statements are taken from Article XVI of the constitution of that organization:

"Section 1. There shall be two standing committees,—one on Arbitration, and one on Appeals, whose duty it shall be to investigate and decide all dis-

putes of a financial, mercantile or commercial character,—the settlement of which is not otherwise provided for,—which may occur between members of the Exchange, or between members of the Exchange and non-members, and which may be submitted to the said committees in manner hereafter provided.

"Section 2. The Arbitration Committee shall consist of five members, and the Appeal Committee of seven members, who shall be appointed by the President, and who shall serve for one year or until their successors are appointed. The various branches of business transacted on the Exchange shall, as far as practicable, be represented in said committees, but no member shall be appointed to serve on both committees."

The advantages of having a standing arbitration committee are: (1) The committee is always available. (2) If care has been exercised in the selection, the members are well qualified to determine trade disputes. (3) There is no difficulty over the disagreement of the parties concerning who shall act as arbitrators. (4) A standing committee acquires valuable experience through the settlement of a number of disputes, and, is, therefore, better qualified to determine future cases. (5) Over a period of time the decisions of a standing arbitration committee take the form of trade precedents, which act as a guide to members of the trade so as to enable them to conduct their trade relations upon a proper basis.

The disadvantages are: (1) The parties are deprived of their right to select the arbitrators. This is of minor importance, provided proper persons have been selected to serve upon the arbitration committee. Litigants do not have the unreserved right to select the members of the jury which is to try their case.

10. *The Method of Choosing the Arbitrators.* In twenty associations the arbitrators are selected by the President of the Association, as illustrated in the previous section. In eleven trade organizations the disputants make their own selection. Four associations empower the Board of Directors to make the selection, while in one case the selection is made by an outside association. In associations where there is a standing arbitration committee, the selection is generally made by the President or the Board of Directors. Where there is no provision for a standing arbitral committee, then the parties usually select their own arbiters or request the President or the Board of Directors to make the selec-

tion for them. The latter method is generally used where the parties themselves cannot come to an agreement concerning the personnel of the arbitral tribunal.

The formation of a panel of arbitrators totaling many times the ordinary number called upon to sit at any hearing is sometimes resorted to. This system has considerable merit, because it gives more elasticity to the range of choice, and generally signifies that the persons appearing on such panel possess the proper qualifications. Furthermore, in an association composed of a large number of allied branches, members from each branch may be represented in the panel. Whereas, if a standing arbitration committee is maintained, the representation of every allied branch upon the committee may prove unsatisfactory, because it would make the tribunal too large and unwieldy. From such a panel the arbitrators might be selected by the president or secretary of the association. In this manner it would be possible to choose arbitrators from those branches of the industry in which the dispute had arisen. Such a method would prevent an unnecessary waste of time for arbitrators not especially qualified to pass judgment on the matter in dispute.

In this connection, mention may well be made of the number of arbitrators to be chosen. In those associations which maintain standing arbitration committees, the membership of the committee generally numbers between five and seven. Where there is no standing arbitral tribunal, but provision is made for the appointment of one by an officer of the association, the number is usually three. It has been the writer's experience that a tribunal of more than three is not desirable. Furthermore, a greater number is unnecessary, and a waste of valuable time. Experience has shown that the best results are obtained where the disputants choose the persons to determine the controversy, in cases where only one arbitrator is selected. Where each one of the parties selects an arbitrator, and two so selected choose a third, the arbiters selected by the parties must guard against being biased in the case in favor of the party appointing them. Under these circumstances it is easy for an arbiter to feel that he must champion the cause of his party rather than to determine the controversy on its merits.

The mutual selection of one person to determine the dispute eliminates the danger of prejudice. This method also recommends itself because it facilitates the arrangement of a suitable date for the hearing. It is much easier to arrange a satisfactory hearing date when the convenience of only a few persons is to be considered. This is further simplified when the number is reduced to one. A saving of expense is also possible where the dispute is to be settled by one arbitrator, and, therefore, this method seems preferable.

11. *The Relation of the Arbitrators to the Trade.* Without exception, the arbitrators in every trade association listed in Table III were members of the trade. In the associations which maintain standing arbitration committees, the arbitrators are chosen from members of the association conceded to have dependable knowledge and experience in their line of trade, as well as a reputation for fairness and integrity. Where the arbitrators are chosen from a panel of arbiters the same qualities are considered; likewise, — where an officer of the association selects those who are to determine a single case. In associations where the disputants select their own arbitrators, in practically every case the parties selected have been members of the trade association. This indicates a desire on the part of business men to have their commercial controversies settled by persons who are thoroughly familiar with the customs and practices of the trade. In other words, where arbitration has been resorted to in trade associations, the parties have signified a desire for expert adjudication of the subject matter. There can be no doubt that where questions concerning quality of goods are at issue, men dealing in these commodities day after day are better qualified to pass upon their merits than a lay jury composed of twelve persons selected at random from all walks of life. The tendency of trial juries in the past has been to eliminate from the panel persons who are familiar with the subject matter. This leads to the doubtful conclusion that cases in a law court should be decided by persons inexpert in judging the facts of the case, necessitating a further expenditure of time and money to procure expert witnesses to educate these inexpert jurors to the point where they may judge the merits of the goods in question. And what assurance is there that the result

will be a decision on the merits? Unfortunately, the contrary sometimes results. Would it not seem more logical to submit such questions to persons who, through their own knowledge and experience, are qualified to render an expert opinion? It would seem so to the writer.

In many industries a series of trade customs and practices have been built up, which govern the daily transactions. In making contracts, these trade customs and provisions impliedly govern, unless a contrary intention is expressly stated. Would it not seem, therefore, that arbitrators selected within the industry who are familiar with these customs, more capable of determining trade controversies than an ordinary trial jury? Apparently members of the forty trade associations which we have studied think so.

12. *Right to Appeal from an Award.* In twenty-one of the associations no appeal is permitted from an award of the arbitrators; in fifteen it is permitted. In the associations which withold the right to appeal, a provision is made in the by-laws similar to that appearing in Article VIII, section 3 of the Philadelphia Maritime Exchange, which states:

"The decision of a majority of the arbitrators shall be final and binding on all parties to the arbitration."

The associations which permit an appeal usually provide that after the matter has been reviewed by the appellate body, its decision shall be binding.

This shows that in trade arbitrations the policy has been to decide the matter solely within the association. The method of enforcing the awards after all appeals have been taken is generally by threats of expulsion from membership in the organization. Prior to the passage of the Act of 1927 this was the only method available for the enforcement of arbitration agreements, but since the passage of that Act either party may compel the proceedings through court action. The mere fact that provision is made to arbitrate under the rules of a certain trade association does not prevent the application of the Act of 1927. However, in order to obtain the benefits of the provisions of the Act of 1927 the parties must have given their consent in writing to submit either an exist-

ing dispute or a future dispute arising out of their contract to arbitration. Whether a provision in the by-laws of a trade association whereby the members agree to submit to arbitration any dispute with a fellow member would be enforceable under the Act of 1927, has not been decided by the courts. Since the parties are required to sign the by-laws the court might well hold that such an instrument constitutes a valid contract between the parties, and compel them to arbitrate disputes arising between themselves, so long as such dispute had arisen while they were enjoying the benefits of their contract of membership. This, however, is a matter for the courts to determine.

There can be no doubt that the assistance of the courts will be given to compel the enforcement of an agreement where the parties have agreed in writing to submit to arbitration either an existing dispute or a future dispute arising out of a written contract,—same to be conducted under the rules and proceedings of a trade body. Likewise, under the Act of 1927 the courts will enforce an award rendered by a trade arbitral tribunal where the parties have in advance agreed in writing to submit the dispute to such body for settlement.

Therefore, the threat of expulsion from the association, to compel obedience to an award, has been fortified by the passage of the Act of 1927, so that in a proper case the association may now obtain the assistance of the courts to enforce the awards by the trade tribunal.

It would likewise appear that if the trade agreement includes a waiver of the right to appeal the courts will recognize this waiver. In consequence, upon motion to confirm an award, they will merely examine the validity of the agreement, and will refuse to grant an appeal from the findings of the arbiters. The Arbitration Act of 1927 may, therefore, be said to have greatly strengthened the effectiveness of trade arbitration.

13. *The Body to Which an Appeal May be Taken.* In the fifteen trade associations providing for appeals, three have established a special appeal body within their own organization; nine refer such matters to their Board of Directors; one permits an appeal

to the association as a whole; and two, which are affiliated with national associations, permit appeals to that body. The fact that appeals are confined to members of the trade is noteworthy, and consistent with the policy of selecting the arbiters from the trade. This clearly indicates a desire on the part of members of trade organizations to regulate their disputes within the industry, rather than to submit to outside reference. There is no more reason for appeal committees to be composed of persons outside of the industry than for the arbitration tribunal itself to be so formed.

14. *The Frequency with Which Awards are Appealed.* In those associations permitting appeals from awards, only one reports a frequent use of this practice. The records of this association were not sufficiently accurate to ascertain the reasons for this situation.

The absence of many appeals is a favorable sign. It denotes apparently that the controversies were decided on their merits; otherwise it is likely that there would have been more appeals.

15. *The Attitude of Members who have Submitted Disputes to Arbitration.* In these associations in which arbitrations have been conducted, the reports show that the members who have submitted to arbitration are generally satisfied. This does not necessarily mean that they unanimously voice that sentiment, but the secretaries report that in the majority of instances there is general satisfaction with arbitration as a method of settling trade disputes. Under any system by which one party wins and the other loses, there is bound to be a certain element of dissatisfaction, mainly on the part of the loser. Those who are familiar with litigation know that in some cases the losing party feels that he has been harshly treated, and is certain that there is "no such thing as justice any more."

Secretaries of some of the older trade organizations inform the writer that there is generally less dissatisfaction on the part of losers under an arbitration settlement than there was when the members resorted to litigation.

Another factor, although not shown in the table because in many instances information was not obtainable, was the apparent good feeling which existed between the parties after the arbitration was completed. Quite frequently the parties continued their business

relations. This condition did not exist, however, in many instances where the parties had resorted to litigation to settle their differences. The apparent reason is that in many arbitrations the dispute is settled within a reasonably short period after it has arisen, and at a time when the parties are both willing to admit that there is "something to be said for the other side." Both parties are in a more receptive frame of mind than they would be if the dispute dragged through several years of litigation. The informal nature of the proceedings is also an influence in the direction of friendly relations, since the parties meet in an informal manner before arbitrators whom they generally know, and in an atmosphere less suggestive of a battle than a court room would be. The opportunity is afforded to each party to have his "say" and there are no technical rules of evidence to prevent each side from informing the arbitrators concerning everything which they think has a bearing upon the case. Litigants are sometimes heard to complain that they have lost the case because of technical rules of evidence which prevent them from stating what they consider to be important facts. Although the decision in these matters of litigation rests with the court, the party who is overruled loses sight of this fact, and frequently blames his adversary for not allowing him to make certain statements which he believes to be essential to a rendition of justice. When this attitude is assumed, the chances of future business relations between the parties are not bright. If arbitration succeeds in overcoming some of these obstacles which are present in litigation, it would seem to have considerable merit.

16. *The Effect of Arbitration upon the Number of Disputes.* In twenty-nine of the associations analyzed the secretaries report that the number of disputes has decreased since provisions for arbitration were introduced. In one association there was no decrease, while in ten the records were not sufficiently accurate to determine. Several reasons are advanced for the decrease in number of disputes. One reason is that a party who knows he has a weak case, realizes also that means are available for a speedy determination of the case on its merits. He cannot bank on a long delay in settlement, as in litigation, during which time his opponent's capital

would be tied up. The means are promptly at hand to disclose the weakness of his position. To illustrate: suppose Jones, a produce dealer, ships Smith, the owner of a chain of fruit stores, a thousand baskets of peaches. The contract price, we will say, is $1.80 per bushel. Before the car arrives at its destination the market price of peaches drops fifteen cents per bushel. Smith realizes that he can buy the peaches at fifteen cents cheaper per basket, and wires Jones that the peaches are not up to standard, and he will not take them unless there is a reduction in price of twenty-five cents per basket. Assuming that the peaches are of standard size, Jones must determine whether he wants to take the risk of reshipping the car, or putting the peaches up at auction. In either event, he knows that he will not obtain the original contract price. He also knows that if he does not dispose of the peaches promptly, they will spoil. He realizes that if he resells the peaches he will take a loss, which he can only recover by suing Smith for damages. In order to do this, he must prove the goods delivered were according to the contract. He is aware that witnesses sometimes move away or die; that several years may elapse before the case will be decided and that worry and expense will be involved. Realizing full well that Smith is taking advantage of these obstacles, Jones decides that it is a saving in the end to compromise by letting Smith have the peaches at $1.55 a basket instead of the original price of $1.80. Smith in this case is deliberately taking advantage of the obstacles presented by litigation in order to compromise the price.

Suppose the contract had specified that, in the event of a dispute arising out of the transaction, the parties agreed to submit such controversy to arbitration before the Produce Exchange of Smith's town. Smith, realizing that he did not have the advantages afforded by the delay of litigation to lean upon, and further that he was bound to arbitrate the matter before arbiters who well understood the produce business, would hesitate to refuse the peaches. Situations similar to this happen frequently but, according to reports from various trade associations, they occur more rarely where the parties are compelled to arbitrate, or even where arbitration is available, but its use is not compulsory. In

the latter instance, a party who deliberately claims defects in order to force a compromise knows that if he is offered the opportunity to arbitrate the dispute and refuses to do so, he will be subject to criticism. He knows also that his reputation in business will not be improved by such a refusal. Therefore, in industries providing for arbitration the unscrupulous class cannot hedge under the advantages of delay incident to litigation. In consequence, they deliberately engender disputes with less frequency.

A system which prevents disputes is much more valuable than the best system ever devised for satisfactorily settling them. If arbitration archives this result, it is an extremely valuable asset to business. The reports from twenty-nine associations indicate that it has had this effect.

17. *The Use of Standard Contracts by Trade Associations.* Reports from fourteen of the associations show that they are using standard contracts. In the writer's opinion, the standard contract serves a very useful purpose in many industries. Where a contract is carefully drawn and adopted by a large group in a given industry, it is generally found that the controversies in that industry materially decrease in number. This standard contract, if properly drawn, contains well defined statements covering all essential terms of the contract. It also clearly sets forth the accepted trade customs and practices concerning such questions as quality, quantity, delivery, cancellations, refusals, inspection, payment, discharge, freight payments, storage charges, conditions of warranties, time for filing claims, — and last but not least, the method by which disputes arising out of any part of it shall be settled. These several points are the chief items concerning which misunderstandings arise. To have them clearly defined in the terms of the contract eliminates many differences. Furthermore, the more general use of such contracts in an industry results in the accepted recognition of its provisions throughout the industry. Consequently, the trade becomes better organized, and the customs more secure and important. Likewise, the resulting uniformity is of great assistance in eliminating disputes.

In England, where arbitration is very widely used, trade prac-

tices have been very carefully formulated by trade associations, and the standard contract plays a prominent part in all commercial transactions. These contracts are drawn to clearly define all essential points. Disputes which arise are, therefore, interpreted with reference to the trade customs which are included in the contract or printed on the back thereof. In New York, where trade associations are more prominent and better organized, the standard contract has been widely used, and follows the English example of careful recognition of the importance of accepted trade practices in its specifications.

A need is exhibited in Pennsylvania trade associations for more universal adoption and use of standard contracts in many industries. As a matter of fact, many Pennsylvania business concerns are too individualistic. There is a need for a closer association of business firms, large and small. The standards of the industry as a whole, as well as the individual members, would benefit by a closer relationship and result in a decrease in the number of disputes.

18. *The Extent to Which Arbitration Clauses are Used in Standard Contracts.* Of the fourteen associations using standard contracts, only five contain an arbitration clause. The reason for this small percentage is difficult to determine. Probably the most important reason is the fact that the majority of members in each of the other associations desire to determine for themselves after a dispute has arisen whether they wish to submit to arbitration or not. A more extensive use of an arbitration clause in such contracts would cause a large increase in the number of arbitrations conducted. It would likewise tend to decrease the number of disputes occuring in an industry. The use of such a clause would be more effective in decreasing the number of disputes than the mere creation of arbitration machinery and its optional use by members. Although an unscrupulous tradesman would hesitate to cancel a contract when he was bound to arbitrate the dispute by the terms of the contract, there is much less restraint upon him where his consent to arbitrate must be obtained after he has made the cancellation. In order to control these abusive practices by arbitration, it is necessary to provide for the arbitration of disputes in the

standard contract, — or if one is not used, then in the individual contract.

English trade associations, as previously stated, used standard contracts extensively and the great majority of them contain provision for arbitration. In this connection the following statement by Rosenbaum in his Report on Commercial Arbitration in England[1] is noteworthy:

"By reason of the fact that every influential merchant or broker in any particular line is a member of the association in his trade, it is practically impossible to buy or sell goods of any kind in any bulk in the London market without using one of the contract forms insisted on by the trade associations.

"Varied though these forms are, because they cover every conceivable subject, from the purchase of a parcel of Argentine oil to the erection of an electric power house in Russia, there is one clause common to them all and that is the clause by which the parties agree to submit to arbitration any dispute arising out of the contract."

In most instances these provisions specify that the arbitration shall be conducted under the rules of the trade association of the industry in which the transaction has arisen. Even in individual contracts made by non-members of such associations provisions for arbitration are quite common. In some of these contracts the rules and regulations of certain trade bodies are specified to be used in settling any dispute by arbitration. In others provision is made for the parties to select their own arbiters, who shall formulate the method of procedure to be followed.

In New York, where trade organizations are more active and where standard contracts are extensively used, it becomes increasingly common for such contracts to contain an arbitration clause. This increased use of arbitration clauses by New York trade bodies will, in time, doubtlessly influence their wider use in this state.

The insertion of arbitration clauses in contracts between tradesmen of different countries has long been recognized as invaluable. During the Civil War many arbitrations took place before the Arbitration Committee of the Liverpool Cotton Association, between

1. American Judicature Society, Bulletin XII, p. 16.

cotton shippers in the South on the one side, and the factors in the Liverpool market on the other, — ranging from differences over liability for war risks, to the condition in which shipments of cotton were arriving in the Mersey.[2] The awards rendered were generally obeyed by the parties, but were not legally binding under the common law in most of the United States, as such agreements were held to be revocable by either party. However, in January of this year the New York Court of Appeals ruled in the case of a summons to appear before a master of the High Court of Justice of England, so that an arbitrator could be appointed. This summons was served upon the party in New York, and the New York Court of Appeals held that failure to heed gave the arbitral tribunal in England jurisdiction of the dispute.[3]

The following excerpts from the opinion of Justice O'Brien in the above case are noteworthy:

"Few arguments can exist, based on reason, or justice, or common morality, which can be invoked for the interference with the compulsory performance of agreements which have been freely made.

"Courts should endeavor to keep the law at a grade at least as high as the standards of ordinary ethics. Unless individuals run afoul of constitutions, statutes, decisions or the rules of public morality, why should they not be allowed to contract as they please? Our government is not so paternalistic as to prevent them. Unless their stipulations have a tendency to entangle national or State affairs, their contracts in advance to submit to the process of foreign tribunals partake of their strictly private business. Our Courts are not interested except to the extent of preserving the right to prevent repudiation.

"We will not entertain the theory that when they agreed to arbitrate at London according to the English arbitration act they contracted with a reservation to refuse to place themselves on English soil and to resist the English law outside that territory.

"The case involves no more than this: whether, staying out of the arbitration, they are bound by an award, made after due compliance with the requirements of the procedural machinery established by the British statute, unless they are able to show that no contract has been made or broken.

"The high court accordingly orders a trial of the case to determine whether the English law was complied with properly, and if so, whether the English

2. Ibid. p.
3. Gilbert v. Burnstine & Geist, 229 N. Y. Appellate Div. 170 (1930).

arbitration act taken in connection with foreign rules of procedure, conforms or conflicts with our public policy."

With this question settled, arbitrations of this type will undoubtedly increase in number.

19. *The Number of Cases Arbitrated by Pennsylvania Trade Associations in 1929.* Twenty-seven of the associations studied conducted one or more arbitrations in the year 1929. The number of cases varied from one to one hundred. In many of the associations the number was small, varying from one to eight.

One of the chief reasons for the small number of arbitrations is the ineffective organization of many of these associations. As has been previously discussed, in many instances the membership of these associations represents only one phase of the business, either manufacturers, wholesalers, jobbers, or retailers. This type of organization, since it only includes one group in the distribution process, does not afford an opportunity for the settlement of the great majority of disputes which arise between any two members. While it is true that in quite a few of these associations, an opportunity is afforded members to arbitrate a dispute occurring with a non-member, yet few non-members are willing to submit their dispute to an organization representing the group to which their adversary belongs. Neutral ground is essential in order to bring members and non-members together for arbitration.

It would seem that a reorganization of many of these associations would have to be effected in order to obtain a wide-spread use of arbitration in most industries. The membership of the associations must be broadened to include members of other groups within the industry. An effort should be made to bring within the same trade body, two or more groups which have the majority of their business dealings with each other. To illustrate, the wholesaler has dealings with two groups in the distribution process, namely, the manufacturer from whom he buys; and the retailer to whom he sells. Establish a trade association composed of wholesalers only, and it has little value as an instrument of arbitration. Add retailers to its membership, and greater opportunity is afforded for the settlement of controversies to which the wholesaler is a

party. The addition of a third group, the manufacturer, completes the cycle, and the wholesaler is assured that the opportunity will be afforded him to settle all of his disputes by arbitration.

Little increase in the number of arbitrations conducted in trade associations in this state can be hoped for without a reorganization of the associations themselves along the above lines.

The necessity for provisions requiring the parties to submit their disputes to arbitrators is another important factor to be considered as a means for increasing the use of arbitration. For example, — as previously pointed out, the required use by members of standard contracts containing arbitration clauses. Where the members do not favor such a contract, then a provision in the by-laws of the association requiring the members to arbitrate their disputes would accomplish the desired result. This would answer the purpose where all groups in either the manufacturing or distribution process of the industry were included in the membership and where a large percentage of the members of each group belonged to the association.

The Time Consumed in Trade Arbitration. Accurate information concerning the average time consumed in Pennsylvania in the settlement of a case by arbitration is not readily available because in many associations no records are kept; in others information concerning this phase is so poorly compiled that it is not reliable. In conversation with the secretaries of some of the associations, they state that in their judgment controversies are generally settled within a month from the time they arise. It is to be regretted that this information is not more accurate.

In this connection it is important to note that it is to the advantage of the party who has sustained injury through breach of a contract to obtain a speedy adjustment of the dispute. Consequently it is to his interest to bring the case to arbitration with despatch. His ability to do this is not hindered by a long list of cases awaiting settlement as would probably be the case if he sought redress by litigation. It seems to the writer that not more than a month should elapse in accomplishing a settlement by arbi-

tration proceeding under the auspices of any of the associations studied.

To insure an expeditious settlement of commercial disputes it is suggested that the parties may find it advantageous to include one or more, of the following provisions in their arbitration agreement:

1. That a failure to present a dispute to arbitrators within a certain period of time after it has occurred will preclude recourse to arbitration.

2. That the arbitrators set a date for the hearing within a given time after they have been notified of the dispute, or the agreement to arbitrate will lapse. (Provision may be made for an extension of time under approved and unusual conditions.)

3. That the award must be rendered within a certain number of days after the hearing has been concluded or the award will not be valid and the arbitrators will not be entitled to their fees.

4. That a limited time be allowed for an appeal.

In order to show how arbitration by trade associations may be effectively organized, and to enable the reader to make comparisons, a brief review of some of the more important New York trade associations[4] will be given.

Examples of Well-Organized New York Trade Associations

The Silk Industry. Arbitration in the silk industry centers in the Silk Association of America. This Association was organized in New York City in 1872, at a convention attended by forty-three silk firms. It now has a membership of over four hundred and sixty, including the following divisions of the trade: raw silk importers; dealers and brokers; commission houses; manufacturers of sewing silks and twists; broad silk, ribbons and hatbands; laces, nets and veilings; knit goods and glove silks; skein dyers; piece dyers; printers and finishers; manufacturers of silk machinery and supplies; manufacturers' agents and commission merchants;

4. See Year Book on Commercial Arbitration, 1927, for plans of trade organizations throughout the United States.

commission warpers and winders; manufacturers of woven labels, hosiery; spun silk, velvets, tie silks, and thrown silks; rayon manufacturers; and warehousemen. The following above named divisions are organized and have their own executive committees: raw silk importers, commission throwsters, manufacturers of sewing silks and twists, broad silks manufacturers, ribbon manufacturers, makers of glove silk fabrics, woven label manufacturers, spun silk manufacturers, and dealers in thrown silks.

The Association recommends a uniform arbitration clause for silk contracts. The use of this form of contract is not compulsory, but the records of the Association show that the clause is widely used. The raw silk, broad silk, commission throwing silk, spun silk, and thrown silk divisions of the Association carry standard arbitration clauses in their contracts, and their individual rules provide for arbitration.

The Silk Association of America issues a monthly publication, "The Silk-worm" which contains articles, replies to questions, and other statements of interest on the subject of arbitration. The Association also publishes an Annual Report, which contains a resume of its activities, as well as a summary of the arbitral awards rendered. In addition, the Association has issued an Arbitration Manual, setting forth the by-laws governing arbitration, the standard arbitration agreement, rules for the conduct of arbitrations, the New York State Arbitration Law, and the United States Arbitration Act. The Association publishes a codified set of trade practices, clearly defining standards of quality, and the terms used, for the guidance of arbitrators in rendering awards.

The record of the Association, from 1900 to 1928, indicates that approximately two million dollars has been involved in cases brought to the Association. The sums involved varied from forty dollars to five hundred, and fifty thousand dollars. Out of all the arbitrations conducted by the Association, not more than five have been appealed to the courts. The type of questions submitted to the Association for arbitration cover a wide range, — from disputes concerning payments and deliveries, — to those regarding defects in goods, quality of finishing, printing, shortages, and de-

lays. A number of the disputes are international in character, involving raw material markets in the Far East and in Europe. In such instances the foreign firm designates a representative in New York to act at the hearings. The Silk Association of America has thus built up a structure of great importance and value to the silk trade, not only in the United States, but all over the world.

The Leather Industry. In the leather industry, with its widely diversified interests, it was essential to establish an inter-trade body, which could assume jurisdiction over the various disputes. The four main divisions of the industry include the tanners of leather, the manufacturers of tanned leather, the wholesalers, and the retailers. Each one of these main branches has its organized trade body, namely the Tanners' Council of America; the National Boot and Shoe Manufacturers Association of the United States, Incorporated; the National Association of Shoe Wholesalers of the United States; and the National Shoe Retailers Association. The business dealings in this industry as a whole are carried on between the members of one association with those of another. Therefore, it would be unsatisfactory for any one association to handle an arbitration involving one of its members and the member of another association. This resulted in a mutual agreement among the four main associations to form the Council of Arbitration of the Shoe and Leather Industry.

This Council is composed of the president of each of the four associations and a secretary. When a dispute arises which the parties desire to arbitrate, they inform the secretary of the Council. The secretary then instructs them to agree upon the number of arbitrators, to hear the case, and recommends that each submit the name of the arbitrators. The Council must approve the arbitrators selected before they are eligible to serve. The Council's approval having been given, arbitration is conducted, and the arbiters submit their report to the Council. The Council then reviews the award and, if found satisfactory, it is approved; otherwise it is rejected.

The arbitrators who hear the dispute do not receive a fee; and the Council makes no charge for its services. An inexpensive method is thus provided for the settlement of disputes voluntarily submitted by members. Furthermore, strict supervision of awards

is provided, and the disputants are assured of fair and impartial decisions in the matters submitted.

Grain, Hay, and Seed Trade. Arbitration is a prime factor in the business life of dealers in various grains. In 1901 the Grain Dealers National Association introduced arbitration into the trade. This organization is national in scope and embraces nineteen affiliated organizations. The system has proved eminently satisfactory and approximately thirteen hundred cases have been disposed of by arbitration.

Not only has the Grain Dealers National Association supported arbitration in theory, but it is one of the associations which has developed to the point of being self-regulating. The by-laws provide for compulsory arbitration of all disputes, and further provide for a member's expulsion from the Association in case of his failure or neglect to submit to arbitration, or his failure to abide by an award. The compulsory provision has proved very satisfactory and has had the rather significant effect of greatly reducing the number of disputes.

The Food Industries. Great progress has been made in the food industries by arbitration, not only in the individual trades, but inter-trade as well. In the fruit and vegetable trades a system of standard rules and definitions of trade terms has been adopted. This system includes provision for arbitration. In 1913 the National Wholesale Grocers' Association, the National Food Brokers' Association, and the National Canners' Association jointly established a system governing the arbitration of disputes arising between members of these associations. The system is known as the National Uniform Plan of Arbitration. Under this plan, a standard type of contract, containing an arbitration clause, is strongly and successfully recommended to the members' use.

Importers of articles of food have also joined in the arbitration movement. The American Spice Trade Association, for example, has established a very complete code of rules and regulations for the compulsory arbitration of disputes in that trade. Various other associations, — including the Green Coffee Association, the National Coffee Roasters' Association, the Cocoa Merchants' Association of

America, Incorporated, the National League of Commission Merchants of the United States, and the American Fruit and Vegetable Shippers' Associations.

English Trade Associations

Since English trades have used arbitration more extensively and for a longer period of time than any American trade organizations, a brief survey of some of their organizations is appropriate.

The Cotton Industry. Cotton markets have been established by force of circumstances in various parts of the world. They are situated at Liverpool, New York, New Orleans, Bremen, La Havre, Alexandria, Bombay, and now at Manchester and Chicago. No doubt, Liverpool, New York, and New Orleans practically control the trend of opinion in cotton traders generally. Liverpool and Manchester are the most important to the English spinner. Liverpool plays an important part in the development of the cotton market. It attracts and collects cotton from all parts of the world. It is the raw material warehouse for the Lancashire cotton trade, because of its seven-hundred warehouses on the river capable of storing two million bales of cotton. Under normal conditions this is an eight months' supply.

The following statement, concerning the Liverpool Cotton Association, appearing in the English Daily Dry Goods News,[5] is significant:

"The business of buying and selling cotton is controlled by the Liverpool Cotton Association, which is one of the best organized trade associations in England. It is a limited liability trading company, and it has six hundred shares ($100 paid) the value of which is today $5,000 per share. It is not the value of the shares, but the conditions and regulations of the membership of the Exchange, and this is so controlled that it can deal very harshly with any breach of the rules and regulations that govern this trade. The Liverpool Exchange houses every method for service in the business.

"The Liverpool Cotton Association also gives highly organized practical service to the spinner. It collects and classes cotton from every seller and from the largest stock of cotton in the world. The spinner could not handle and test the cotton for himself. In cotton there is a great difference of opinion

5. News section, April 19, 1926.

as to what it is. There is no doubt about the great advantage to mills being able to examine the cotton for themselves, compare it with what they are using and buy the actual cotton on the spot. This is realized in Liverpool where there is at least twenty different forms of contract supported by over seven hundred rules and by-laws subject to modification as cotton activities progress. There is great need for arbitration concerning interpretation of these contracts as to staple, quality and value as between buyer and seller. Liverpool is the arbitration centre of the world. Shippers, importers and manufacturers all go to Liverpool for a decision.

"The arbitration rooms of the Liverpool Cotton Exchange are a magnificent set of rooms. Samples are kept there and comparisons are made between one class and another to settle any dispute. Lancashire spinners buy most of the cotton from actual samples shown, buying equal to a type or buying well-known running marks that they previously used."

Produce. The home and center of the general produce trades in Liverpool is the Exchange Newsroom, in which the Liverpool United Central Produce Association is the leading organization. A large proportion of the business passing through the Exchange Newsroom is transacted on the contract forms of this association. So closely are the fortunes of the Newsroom and the Produce Association interwoven, that a brief sketch of their activities will serve as an outline of the general produce trades in Liverpool.

The Liverpool United General Produce Association is the heir and successor of the Liverpool General Brokers' Association, which goes back as far as the year 1838. In 1928, however, many of the leaders felt that the time was opportune for extending the interests of the Association, so as to include not only brokers, but importers, seed crushers, manufacturers, and so on. This proved to be a wise step, as it not only kept the General Produce Association in line with the modern trend of business, but placed at the disposal of the Association in selecting panels to handle appeals, a body of experienced men probably without equal in the kingdom in their particular lines.

The Association now has two hundred and thirty-nine full members, and forty-four associate members. It embraces fourteen sub-committees, comprised of experts representing the various trades with which these sub-committees deal. These include palm oil, tallow, agricultural seeds, coffee, farinaceous products, naval stores

(rosin and turpentine), oilseeds and feeding stuffs, rice, rubber, seed oils and nuts, whale oil, etc., and lastly, West African cocoa. Liverpool was the birthplace of the last named trade and the cocoa contract of the Liverpool Association has a special arbitration panel to deal with any question that may arise out of the conduct of this business.

In addition, the Association has excellent rules for the conduct of arbitrations held under its auspices, and two appeal committees are appointed yearly from the members of the board of directors, who carefully and impartially consider any matters arising out of arbitrations in which members or traders using the standard contracts of the Association are interested.

The following statement of the Secretary of the Liverpool General Produce Association is significant:

"It may justly be said that the work of the sub-committee is never ending, as one or other of them has before it continually the scrutiny and revision of some contract form or other, from which it will be evident that the contracts of the association are never suffered to lag behind the most modern requirements. Care is taken that the constitution of these sub-committees provides for the representation of all parties concerned, viz., brokers and dealers, importers and manufacturers. This ensures strict impartiality, and the production of standard forms which are universally acceptable.

"Thus, thousands of tons of produce, from countries as far apart as China, Africa and North and South America, and ranging from rice to a bulk cargo of a thousand tons of liquid oils, are shipped, insured, transported, landed, sampled, tested and distributed in ways and means cared for and governed by the rules and provisions of this association, and if there is romance in business, the work of the Liverpool General Produce Association with its widespread ramifications, has largely helped to weave the romance of the great port of Liverpool."[6]

The Corn Trade. The London Corn Trade Association is the most important organization in the industry. The standard contract of this organization is a masterpiece. It would seem that every conceivable question that might arise out of a transaction for the sale of corn has been foreseen, and a clause inserted to cover a possible issue. The following are the more important phases covered: The quality, price, quantity, method of shipment, results to be used,

6. Balmer, C. P., Chamber of Commerce Journal (England), Aug. 30, 1929.

weighing, brokerage, insurance, blocades, proof of loss, deficiency, default, and last but not least, the method of settling any disputes arising out of the contract. Arbitration is the method provided, and the entire back of the contract is devoted to a detailed system of procedure for carrying it out. A clause in the contract requires the parties to arbitrate under the rules of the association, which specify the time within which the claim shall be filed; the method of appointing the arbitrators; those who may serve as arbitrators; the effect of the award; the right to appeal from awards; the body to whom such appeals may be made; the method of enforcing award; etc. Since the adoption of this type of contract there has been a marked decrease in the number of disputes which have arisen between members of the association.

There are many other interesting English trade associations, but space does not permit further discussion.[7] The following article appearing in the United Kingdom Gazette[8] illustrates the attitude of business men in England in arbitration:

"Traders and men of business generally long ago decided that Trade Arbitration was at once a simpler, sounder, quicker, and cheaper method of deciding their differences than was a legal action, with all its costly procedure, and its inevitable delay. We believe the plan to Trade Arbitration as set up in many trades has worked well and promptly in getting rid of disputes, and saving all parties the needless waste of time and money involved in a long fought out action at law.

"The Law Courts, and the Lawyers generally, have usually opposed the extension of arbitration as it would reduce the number of actions brought and so would lower the prestige, as well as the profits, of the profession. It was only when Traders came to appreciate the costliness and dilatoriness of legal proceedings, that they turned to arbitration as a sound business proposition. Progress has been made in working this out as a good remedy for wasteful litigation. It is now rather late in the day to put back the clock and try to make the business world return to the courts they have so largely left to their advantage. Of course, the proposals made by a recent speaker at the Solicitors' meeting were welcomed in their professional aspect. The most striking of these suggestions was, that no person other than a Barrister, Solicitor, or Accountant, should be entitled to act as an arbitrator without first passing an examination set by a joint committee of the Councils of the

7. See Rosenbaum, S., Commercial Arbitration in England, op. cit., p. 14 et seq.
8. Issue of October 20, 1926.

professions here indicated. Are not Officialism and the Examination System already quite rampant enough without adding another costly body to cause complications? We do not believe that any Business man would support that quite unworkable idea. A practice has grown up of each Trade Association having its own panel of arbitrators. This is a business fact, and the method is well known to have worked out well in the way of settling such differences quickly and cheaply. Yet one can hardly expect it to be popular with practicing solicitors. Now it was suggested that a better plan would be the appointment of Registrars of Arbitration in London and the country, whose function it would be to compile a panel of properly qualified arbitrators, who could be chosen by the parties after elaborate formalities and the necessary expenses. But in our opinion, this complicated plan for a sort of official Arbitration is only another way of seeking to recapture the good Business litigation which once went to the Courts, but which was driven away by the costliness, delay and uncertainty of their legal proceedings.

"Trade arbitration is a new thing, while our legal procedure is essentially ancient. So we have the pouring of new wine into old bottles, which is always risky. Trouble arises at the junction of arbitration with legal process when it comes to deciding a legal question, or enforcing an award. If this could be made simpler, there would be improvement, and we should witness the harmonious working together of business arbitration and the courts of law."

CHAPTER VI

The American Arbitration Association

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CHAPTER VI

The American Arbitration Association

No study of trade association arbitrations would be complete if one failed to review, even though briefly, the activities of the American Arbitration Association.[1] With respect to commercial arbitration this organization may well be considered as a super-trade association, ready and willing at all times to assist all trade bodies with their arbitral problems. To it should go a considerable portion of the credit for the phenomenal growth of the arbitration in this country in recent years.

Organization and Administration

The American Arbitration Association is a voluntary educational organization, incorporated under the Membership Corporation Law of the State of New York. It is maintained by dues from its membership and by contributions. It was organized to serve commerce through a promotion of the use of arbitration. To this end it has functioned along three distinct lines,—as an educational body, as a service organization, and as a practical arbitral tribunal.

This organization has approximately 800 members. Its membership is composed of individuals, firms and associations. Its membership does not represent all of the firms and corporations who benefit from the use of either its arbitration clause or its facilities.

Its administration and facilities are under the supervision of a Board of Directors, who function through an Executive Committee, a Committee on Arbitration, and a Committee on Arbitration law. The administrative offices of the Association cover the entire twenty-ninth floor of the Lefcourt National Building, located at 521 Fifth Avenue, New York City.

1. Much of the information in this chapter has been obtained from personal interviews with members of the Executive Staff of the American Arbitration Association. A pamphlet, entitled "Arbitration by the American Arbitration Association" also supplied some of the material.

Educational Work.

The success and present day use of commercial arbitration in the United States may be attributed in a large degree to the educational work undertaken by the American Arbitration Association. This organization, through its Research Council, made arbitration surveys in many of the leading commercial states. As a result of these studies, the need of new arbitration legislation in many states was disclosed. The need having been determined, the efforts of the Association were directed toward the preparation of a Uniform Arbitration Bill, which was submitted to a number of state legislatures. The cooperation of state and local Chambers of Commerce prominent trade bodies, and individuals, was secured to urge upon the respective legislatures the advisability of adopting the Uniform Arbitration Bill. As a result of these efforts, such legislation has been passed by eleven states and the federal government.

Thorough studies have been made of foreign arbitration systems, and the Association has been instrumental in securing the publication of such books as the Year-Book on Commercial Arbitration, the International Year-Book on Civil and Commercial Arbitration, and the Practice of Commercial Arbitration. From time to time pamphlets on various phases of arbitration practice are published and distributed by this organization for the benefit of those interested in arbitration. At the present time the organization is engaged in compiling a Handbook for Arbitrators, the need of which has been sorely felt for some time. This organization maintains a clearing house for all sorts of information concerning arbitration, and maintains a competent staff prepared to render assistance along any line, either to individuals or to associations, who desire to establish arbitral tribunals or to make proper provisions for arbitration. Through this branch of its service, the Association has been cooperating with foreign tribunals and associations in encouraging international arbitrations, and in furnishing facilities in this country for the necessary procedure in such matters.

The establishment of a satisfactory form of procedure for the settlement of commercial disputes, and its widespread use, must be preceded by a large amount of educational work, akin to mis-

sionary work. This was recognized by the American Arbitration Association and in consequence, it has used its resources to the fullest extent in directing and fostering this movement. If it possessed greater resources or if similar organizations were in existence in other parts of the United States, a more widespread interest in and use of arbitration would be evidenced. The value of the activities of this organization is demonstrated in the increased use of arbitration by trade organizations in New York City. If its resources permitted the formation of branches in other important cities, much benefit would result. The writer is of the opinion that such an organization located in this State would furnish the necessary stimulus to the use of trade arbitration in Pennsylvania.

As a Service Organization.

The services rendered by the American Arbitration Association, for the purpose of convenience, will be divided into two groups. The one will comprise the services which it renders to individuals, firms, and associations in the form of assistance to them in establishing a system of procedure. The other will comprise a discussion of the actual functioning of the arbitral tribunal which the Association has established in its own offices for the conduct of arbitrations. The latter will be discussed in the subsequent section.

Provides Arbitral Facilities in Many Cities. In order to accord the means of arbitration to individuals, firms, and associations who do not have arbitration facilities of their own, the American Arbitration Association has provided facilities[2] for this purpose in 1712 cities in the United States. Care has been taken to select cities and towns in which the greatest commercial activity exists, and at the same time to have all sections of the state represented. Arbitration facilities are provided in every state of the union, and it is interesting to note that, in so far as Pennsylvania is concerned, eighty-nine cities and towns are so equipped. The facilities are maintained through the cooperation of various chambers of commerce and trade organizations with the American Arbitration Association. In this manner the American Arbitration Association makes it possible for parties who do not belong to a trade body furnishing arbitral facili-

2. See pamphlet, Arbitration by American Arbitration Association, p. 19.

ties, to secure a tribunal before which they may arbitrate their commercial disputes.

Provides Panel of Arbitrators. In order that the parties may obtain the services of impartial and competent arbitrators the association has established a panel of arbitrators numbering 7000, who have been selected because of their prominence and reputation in their respective trades. A certain number of arbitrators on this panel are selected from each city and town in which the Association has established arbitration facilities. The members of this panel of arbitrators have signified their willingness to serve as arbiters without compensation in the interest of better trade relations. The parties to a controversy may choose their own arbiters. They are not bound to make their selection from this panel in order to obtain the benefit of the Association's facilities. Where the parties desire to arbitrate but cannot agree upon the persons who are to decide the dispute, they may agree to have the American Arbitration Association make the selection for them, thus assuring a neutral tribunal.

Recommends Arbitration Clause. To obtain the benefits of these facilities the parties must provide, in writing that the dispute be submitted to arbitration under the rules of the American Arbitration Association.[3] This may be done either when the parties enter into a contract, or after a dispute has arisen. The Association's arbitration clause for domestic trade contracts is as follows:

"Any controversy or claim arising out of or relating to this contract or the breach thereof, shall be settled by arbitration in accordance with the Rules, then obtaining, of the American Arbitration Association, and judgment upon the award rendered may be entered in the highest court of the forum, state or federal, having jurisdiction."

This clause, or one similar to it, may either be inserted in the contract, or the parties may sign a submission to arbitration after the dispute arises. The Arbitration Association has printed submission forms, which will be furnished to the parties upon request. These printed submission forms include the rules of the Association as a part of the form, and are binding upon the parties who sign the submission. The rules of the Association are carefully drawn so as

3. For rules, see pamphlet, Arbitration by American Arbitration Association, pp. 11-15.

to protect the parties to the submission; to insure the enforcement of the agreement to arbitrate, and obedience to the award when rendered. Every step in the arbitration procedure is carefully provided for so as to enable the award to have binding legal effect.

Provides a Schedule of Fees. Where parties use the facilities of this Association, the costs of the services rendered are defrayed by a fee assessed against the parties, based upon the amount of the claim and on the number of hearings held. The rules[4] of the Association provide that the schedule of fees to be paid by each party for the first hearing shall be as follows:

"$10 when the claim is less than $1,000.

$25 when the claim is $1,000 and less than $5,000.

$50 when the claim is $5,000 and less than $10,000.

$100 when the claim is $10,000 and less than $100,000.

$150 when the claim is $100,000 and less than $200,000.

Amount to be agreed upon when the claim is $200,000 or more. $50 deposit fee when the claim does not disclose the amount involved, subject to readjustment on the above basis.

For each subsequent hearing, the fee shall be fixed at one-half of the amount of the first hearing. The Arbitration Committee may make such adjustments in these fees as may seem equitable. The fee for the first hearing shall be deposited at the time of instituting the proceedings; if the matter is withdrawn before the first hearing is held, one-half of the fee is returnable. When oral hearings have been waived, the fee shall be that fixed for the first hearing."

The fees amounting to a maximum of one percent and generally less of the claim seemed to be exceedingly reasonable when it is considered that the Association makes all of the arrangements for the arbitration and supervises its conduct.

Renders Services to Trade Associations. The American Arbitration Association also renders valuable services to trade organizations.[5] The following examples are illustrative:

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4. See supra, p. 156, footnote 3.
5. See Pamphlet, Arbitration by American Arbitration Association, p. 16-19.

1. It drafts standard arbitration clauses for domestic and foreign trade contracts, and furnishes information concerning their adaptation to special contract forms.

2. It drafts an arbitration plan for any association suited to its requirements.

3. It installs arbitration machinery for any association.

4. It reconditions arbitration machinery upon request, whether the arbitration facilities or services maintained by other organizations seem to be out of condition, with respect either to business practice or to modern arbitration statutes.

5. It has its own arbitral tribunal which may be used by any individuals, firms or trade associations to settle their commercial controversies.

Many firms and corporations use the arbitration clause recommended by this Association, and many trade organizations recommend its use to their members. As to these users of their arbitration clauses, the Association has the particular responsibility of providing for an arbitration whenever and wherever it may be requested. It has the further responsibility of keeping these clauses in good usable condition by supplying current information concerning them.

Some firms and corporations use general clauses which do not provide for arbitration under any specified rules, and when a controversy arises they request that the arbitration take place under the rules of the Association. The recent increase in the number of cases submitted where a common form of clause has been used would indicate the growing prestige and value of the American Arbitration Association's rules of procedure.

An interesting example of one of the accomplishments of the Arbitration Association, in securing the introduction of a general arbitration clause in commercial contracts, is that in 1929 eighteen large department stores agreed to use the same in all their purchase contracts. It is estimated that this one achievement placed merchandise contracts of over $400,000,000 under the protection of arbitration.

As an Arbitration Tribunal.

The American Arbitration Association, in addition to furnishing arbitration facilities all over the United States, conducts an arbitral tribunal of its own in the offices of the Association, which as previously indicated is available to anyone desiring to use it. Two rooms have been specially equipped for this purpose and one member of its executive staff devotes his time to arranging and supervising arbitrations which are to be conducted in these chambers. It is his duty to draw up the proper papers, send notices to the parties, select the arbitrators where requested, arrange for the arbitrators and the parties to be present for the hearing, attend the hearing and supervise the proceedings, administer the proper oath, draw up the award according to the direction of the arbitrators, and see that it is duly signed and properly recorded.

The Nature of the Arbitral Proceedings. In a recent trip to New York the writer had the privilege of attending an arbitration conducted before this Tribunal. There were three arbitrators hearing the case, each of whom was an official of a large corporation. Despite the fact that the hearing consumed almost three hours these men were extremely interested and gave careful consideration to all details. There was a total absence of a spirit of compromise and every effort was made to determine the case on its merits. The parties were given every opportunity to make a complete statement of their case, the arbitrators from time to time requesting additional facts which they deemed important. One of the parties was represented by legal counsel while the other was not. This fact did not seem to work a disadvantage to the party not represented by counsel.

The Attitude of Lawyers to the Procedure. It is quite surprising that in over 50% of the cases which have been arbitrated before this Tribunal one or both of the parties has been represented by counsel. It is also surprising to note that in a large percentage of such cases the services of the Tribunal have been sought by legal counsel. In quite a few cases which have been voluntarily brought to this Tribunal legal counsel have actually brought the case there,

instead of taking it to the courts for settlement. Each year finds a larger number of cases brought by legal counsel than in previous years. This would indicate that lawyers are gradually adopting a less hostile attitude to arbitration than they formerly had. There is no apparent reason why a lawyer should not select an arbitration tribunal especially if his client's case involves technical questions of fact, as this type of tribunal affords more expert adjudication of such matters and also provides a much more speedy settlement. Under these circumstances the client's best interests should incline counsel to suggest arbitration.

The Dispatch with Which Cases Are Arbitrated in the Tribunal. In examining fifty cases selected at random from the arbitration dockets of the American Arbitration Association it was found that the average time consumed in adjusting them was slightly over five weeks. This is noteworthy when one considers that in some of these cases, one of the parties had to be notified, the arbitrators had to be selected and notified, a convenient date for the hearing arranged, and time allowed for the arbitrators to make their award.

Use of Tribunal by Affiliated Trade Associations. In addition to providing an arbitral tribunal for anyone wishing to us it, the American Arbitration Association has agreed to handle all arbitration matters for a number of trade organizations which have become affilited with it. For example, the Actors Equity Association requires its members to provide for arbitration in their contracts with theatrical producers and all disputes occurring under these contracts are arbitrated before the Arbitration Association's Tribunal. Similar arrangements are made with a number of large trade organizations[6] which prefer the efficient arbitration methods of the Arbitration Association rather than the facilities of their own arbitral tribunal.

A Summary of Cases Arbitrated in the Tribunal. The following table shows the important facts concerning the cases which have been submitted to the Arbitration Association's Tribunal during the years 1927 to 1930:

6. For list of these organizations, see Third Annual Report of American Arbitration Association, 1929, pp. 34-36.

TABLE IV

SUMMARY OF CASES ARBITRATED BEFORE THE AMERICAN[7] ARBITRATION ASSOCIATION'S TRIBUNAL

	1927	1928	1929	1930
Cases pending at beginning of first quarter	21	19	64	43
New cases during year	223	304	323	306
Total cases disposed of	225	259	344	292
Number of awards	113	134	204	158
Number settled and withdrawn	112	125	140	134
Pending December 31st	19	64	43	57
Number of hearings in cases disposed of	132	186	276	212
Number of Arbitrators in cases disposed of	182	322	509	381
*Amount awarded	$94,491	$277,917	$374,154	$295,553

*These amounts represent but a part of the value of the commodities involved as many awards were for specific performance or concerned questions not involving payments of amounts.

This table indicates that there has been an increase in the number of new cases brought to the American Arbitration Association each year with the exception of 1930 when the number dropped below that of 1929, but still remained above the 1928 figure. A similar trend also occurred in the number of awards rendered each year.

It is significant that nearly one-half of the cases brought to the Arbitration Association's Tribunal were either settled or withdrawn before the date set for the hearing. This would indicate that in a large number of cases one of the parties realized before the hearing took place that his claim was not justified or it might also indicate that each of the parties realized that there was at least some ground for the contention of the other party.

The figures in this table show that the number of arbitrators appointed to determine an issue has increased each year in greater proportion than the number of awards. This indicates that the parties prefer a larger number of arbitrators than were formerly

7. See Third Annual Report of American Arbitration Association, 1929, for this information from 1927 to 1929, p. 26. Figures for 1930 were procured direct from the Association.

selected. In 1927 since only 181 arbitrators determined 113 awards it is apparent that many of these disputes were submitted to one arbitrator. In 1928, 322 arbitrators were selected to determine 134 cases. This indicates that more than one arbitrator was selected in a larger number of instances than in 1927. A similar trend is apparent in the figures for 1929 and 1930.

In 1927 the amount of money awarded in 113 awards was $94,-491, or an average of about $835 for each case. In 1928 the total amounts awarded in 134 cases was $277,917, or an average of about $2,075 for each case. In 1929 the total amount represented by 204 awards was $374,154, or an average of $1,834 for each award. In 1930, 158 awards called for the payment of a total of $295,553, or an average of $1,870 for each award. These figures indicate that the claims brought to the Tribunal for settlement were for substantial sums in many instances. It appears, therefore, that disputants regardless of the amount of their claims believe arbitration to be a satisfactory method of adjustment.

Advantages of Arbitration Stressed by the Association.

Since the American Arbitration Association has been confronted daily with arbitration problems, its observations concerning the advantages of arbitration are of value. In this connection it has been observed[8] that commercial arbitration accomplishes the following objectives:

1. It prevents unnecessary delay.
2. It affords expert adjudication of the facts.
3. It eliminates the cost of unnecessary litigation.
4. It prevents loss incurred in compromising claims.
5. It prevents the loss of commercial good will.
6. It prevents damage to reputation resulting from publicity of controversies.
7. It raises business standards and ethics.

8. This information was procured by the writer from the American Arbitration Association directly.

Care Deemed Necessary in Arbitral Matters.

Experience with arbitration also has shown that care must be taken in the following matters to assure its successful operation:

1. In selection of the type of dispute to submit to arbitration. Thus, where a dispute has arisen which involves technical questions of law, but the facts are undisputed, and there is no previous provision for arbitration, the controversy is more suitable for litigation, not arbitration. An example is a dispute between claimants over the division of an estate. On the other hand, if the dispute concerns the quality of certain goods, arbitrators selected because of their knowledge of such commodities are likely to afford better adjudication of the matter than a jury.

2. In drawing the agreement to arbitrate or preparation of the submission. In this connection it is highly important that the agreement meet the requirement of the law; otherwise it may be revoked. This causes delay and is unsatisfactory. As previously mentioned, in Pennsylvania the agreement to arbitrate must be in writing.

3. In selection of the arbitrators. This is important for several reasons. First, if the dispute involves a technical question of fact and the arbitrators are not selected because of their familiarity with the subject matter involved, the advantage of expert adjudication is lost. Second, is the need for selecting arbiters who possess a high degree of honesty and integrity; who will decide the issue upon its merits. Arbitrators who are disposed to compromise a claim are not desirable.

4. In determining the award. This is a matter in which the arbitrators must exercise care, or it may not have binding effect. The award must be definite and conclusive; it must not leave any matter for future determination. It should be written and signed by the arbitrators. To prevent any irregularity, the arbitrators should reduce the award to writing and sign it before they adjourn the meeting at which the award was determined. If the submission requires the award to be rendered by a certain date, the arbitrators should comply with this term else the award will not be valid.

5. In proceeding upon the award. If the losing party will not obey the award, then steps must be taken to reduce it to a judgment. As has been previously indicated,[9] this is done by filing a motion to confirm the award. In Pennsylvania such motion must be filed in the proper court within a year from the date the award is rendered. If either party desires to have the award modified, corrected or vacated, a motion to this effect must be filed within three months after the award is rendered.

Although some of these matters may seem trivial, experience has shown that all are important. The failure to exercise care may result in delay or in dissatisfaction with the practice.

Its Future Position in the Field of Arbitration.

Each year the American Arbitration Association performs more valuable services for individuals, firms and trade associations in the field of arbitration. There still remains much work to be done and much effort must be expended to educate business men in every section of the country concerning the advantages of arbitration, — the proper methods to be used in providing for arbitration, and the most satisfactory machinery to be set up for the conduct of arbitration proceedings. The greatest returns for the efforts of this Association are evident in New York City and State where the use of arbitration is becoming quite extensive. The location of the American Arbitration Association in New York City accounts for much of this use since it is in a position to supervise and stimulate the practice of arbitration. If greater funds were available to permit this Association to establish branches in various commercial centers of the United States a much wider use of arbitration could be expected in a much shorter period of time. It is said that this is not possible at the present time.

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9. Supra, p. 96.

CHAPTER VII

Arbitrations Under Business Dictatorships

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CHAPTER VII

Arbitrations Under Business Dictatorships

Is there any alternative to the statutory arbitration systems set up by the Legislature and those in operation in the trade associations described in Chapter V? A possible answer to this question is given in the elaborate arbitration system created in our new business dictatorships. These systems have arisen because abuses have crept in and threatened to disrupt the internal structure and to undermine public confidence in the industry. There are at present several industries in the United States which have established such dictatorships. Professional Baseball, the Motion Picture Industry, the Theatrical Producers, the Associated Dress Industries of America, the Women's Wear League of America, and the Electrical Contractors' Association of New York are among the industries now presided over by a business dictator. In this chapter[1] the writer will examine two of these dictatorships and will briefly refer to four others.

The Baseball Dictatorship.

One of the chief causes for the appointment of a dictator to govern professional baseball activities was the scandals which grew out of the 1920 World Series games.[2] The nature of these scandals was such as seriously to threaten the popularity of that pastime. A large investment of the owners of Major League Clubs was represented by plants and equipment as well as players' contracts. These investments would have been seriously jeopardized by an attitude of antagonism for the game on the part of the public. Not many years prior, considerable strife had existed due to the formation of the Federal League, whose members induced whole-

1. The writer is indebted to Dr. James T. Young and Mr. Edward W. Carter, of the Political Science Department of Wharton School of Finance and Commerce, University of Pennsylvania, for their helpful criticisms and suggestions concerning the material in this Chapter.

2. See article entitled, "Making Blacksox White" in Literary Digest, issue of August 20, 1921, p. 13.

sale breaches of Major League players' contracts. In many respects, this industry was in none too healthy a condition; in fact, it was almost demoralized. In order to prevent further deterioration and with the hope of restoring the game to its former popular position with the public, the owners decided to seek the services of the Honorable Kenesaw M. Landis,[3] then a United States Circuit Court judge. Judge Landis consented and on January 12, 1921, was named the Commissioner of Organized Professional Baseball, which position he still holds.

In order to discuss even briefly the functions of this business dictator, it is necessary to examine two important agreements,[4] which provide for the government of baseball. All disputes that arise in the baseball business between clubs, players or managers, by the terms of these agreements are referred to the commissioner for adjudication and not to the courts. The first is the agreement between the National League of Professional Baseball Clubs and each of its eight constituent clubs, of the one part, and the American League of Professional Baseball Clubs, and each of its eight constituent clubs, of the other part.

The Major League Agreement. No clearer or more concise statement of the powers of the Commissioner of Organized Professional Baseball is possible than that in the following provision in Article I of the Major League agreement:[5]

ARTICLE I — THE COMMISSIONER

"Sec. 1. The office of commissioner is hereby created.

"Sec. 2. The functions of the commissioner shall be as follows:

(a) To investigate, either upon complaint or upon his own initiative any act, transaction or practice charged, alleged or suspected to be detrimental to the best interests of the national game of baseball; with authority to summon persons and to order the production of documents; and, in case of refusal to appear or produce, to impose such penalties as are hereinafter provided.

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3. See article entitled, "Judge Landis, New Czar of Baseballdom," Literary Digest, Dec. 4, 1920, p. 46.

4. For text of these Agreements see Birdseye's Abbot's Encyclopaedia of General Business and Legal Forms, pp. 1885-1889.

5. For text of this Agreement see Birdseye's Abbot's Encyclopedia of General Business and Legal Forms, pp. 1885-1887.

(b) To determine, after investigation, what preventive, remedial or punitive action is appropriate in the premises, and to take such action against Major League, Major League Clubs or individuals as the case may be.

(c) To hear and determine finally any dispute between the Major League which may be certified to him for determination by the President of either Major League.

(d) To hear and to determine finally any dispute to which a player is a party, or any dispute concerning a player, which may be certified to him by either party or any of the disputants.

(e) To formulate, and from time to time announce the rules of procedure to be observed by the commissioner and all other parties in connection with the discharge of his duties. Such rules shall always recognize the right of any party in interest to appear before the commissioner and be heard upon any matter affecting the interests of the Major Leagues, or either of them.

"Sec. 3. In the case of conduct detrimental to baseball by Major Leagues, Major League Clubs, officers, employes or players, punitive action by the commissioner may in any case take the form of a public reprimand. In the case of a Major League or Club, the commissioner may impose a fine not exceeding Five Thousand ($5,000.00) Dollars for any one offense. In the case of a Major League Club, punishment may extend to temporary deprivation of representation in joint meetings held under this agreement. In the case of any official or employe of a Major League or of any Major League Club, punishment may extend to suspension or removal. For such conduct a player may be declared by the commissioner temporarily or permanently ineligible to play for any club which is a party to this agreement.

"Sec. 4. In the case of conduct detrimental to baseball by organizations not parties to this agreement, or by individuals not connected with any of the parties hereto, the commissioner may pursue appropriate legal remedies, advocate remedial legislation, and take such other steps as he may deem necessary and proper in the interests of the morale of the players and the honor of the game.

"Sec. 5. The commissioner shall hold office for seven (7) years and shall be eligible to succeed himself. His compensation shall be Fifty Thousand ($50,000.00) Dollars per annum.

"Sec. 6. The first commissioner under this agreement shall be Kenesaw M. Landis. Upon the expiration of his term, or upon his resignation or death during his term, his successor shall be chosen by a vote of the majority of the Clubs composing the two Major Leagues. In the event of a failure to elect a successor within three (3) months after the vacancy has arisen, either Major League may request the President of the United States to designate a commissioner, and the person when thus designated shall thereupon become commissioner with the same effect as if named herein."

It is quite evident that the powers which have been given to the commissioner are quite unusual and very broad in scope. He has not only the right to investigate upon complaint, but also upon his own initiative, any practice detrimental to the game of baseball. Not only is the power given to investigate but also the power finally to determine the matter and to enforce the decision.

It is noteworthy that at the expiration of the Commissioner's first term he was again elected for another term of seven years. Evidently the owners of Major League Clubs were satisfied that the game had benefited by his edicts or they would not have returned him.

In addition to the commissioner there is provision made in the agreement for an Advisory Council.[6] It is composed of the commissioner and the president of each of the Major Leagues. The decision of the commissioner is controlling in all cases where there is a division of opinion within the Council. This makes the commissioner the ultimate arbiter in all cases.

The Advisory Council is required under the agreement to submit to the Major Leagues proposals for the adoption of the following matters:

1. Rules to govern the playing of the World Series.
2. Rules to regulate all contracts between the Major Leagues.
3. Rules to determine the relationship between clubs, and between players and clubs.
4. A standard form of player's contract.
5. Amendments to any existing rules.

If these rules, regulations or standard forms proposed by the Advisory Council are accepted by the Major Leagues, they are binding and cannot be set aside without the concurrent action of both Major Leagues. In case of any disagreement over such a matter, final determination resides with the commissioner.

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6. See Birdseye's Abbot's, op. cit., p. 1886.

Article V provides for joint meetings of the two Major Leagues, which are presided over by the commissioner. Any question arising at such meetings must be submitted to the Clubs of each League for vote. If this vote results in a variance then the commissioner shall cast the deciding vote, from which there can be no appeal.

Article VI provides that the salaries of the commissioner and the expenses of the Advisory Council shall be paid by the Major League Clubs, share and share alike.

The submission to the jurisdiction of the commissioner is provided for in Article VII. The Major Leagues and their constituent Clubs severally agree to be bound by the decisions of the commissioner. They also severally waive any right of recourse to the courts from the commissioner's decisions. Provision is made under this Article that all players' contracts as well as all contracts between Major Leagues or their Clubs, officers and employees shall contain a clause by which the parties agree to submit themselves to the discipline of the commissioner and to accept his decisions as binding. The duration of this Major League Agreement is for a period of twenty-five years, and therefore still has fifteen years to run.

The Major-Minor League Agreement. On the same day that the Major League Agreement was entered into, a similar agreement[7] was drawn between Major Leagues and the National Association of Professional Baseball Leagues, hereafter referred to as the Minor League. This agreement brings under the jurisdiction of the commissioner all of the important Minor League Circuits in every section of the United States. In number of players, managers, and clubs this agreement is more extensive in its range than even the one just described. The first Article in this contract provides for recognition of Kenesaw M. Landis as commissioner of baseball. The matters which come within his jurisdiction concerning the Minor Leagues, however, are limited to the extent of those definitely specified within the agreement.

7. For text of this agreement see Birdseye's Abbot's op. cit., pp. 1887-1889.

These matters may be briefly stated as follows:

1. The commissioner is given authority to investigate and take appropriate action in any case in which conduct detrimental to baseball is charged or suspected.

2. This action may take the form of public reprimand or in the case of a player he may be declared to be temporarily or permanently ineligible to play for any club related to any of the parties of the agreement.

3. In case of any dispute between the Major Leagues, or either of them, or any of their clubs on the one hand, and the Minor Leagues, or any of them, or any of their clubs, on the other, either disputant may certify the dispute to the commissioner for decision, and his determination thereof shall be final.

4. Where a dispute arises between a Minor League player and a Minor League Club, or between one Minor League Club and another and the amount involved is more than $300, an appeal may be taken from the award of the National Board of Arbitration to the commissioner whose decision is final. In case of an appeal of this type a representative designated by the Minor Leagues is entitled to appear before the commissioner and be heard upon the pending question.

5. In all disputes between Minor League Clubs or between a Minor League player and his club involving less than $300, the National Board of Arbitration has final jurisdiction.

The powers granted to the commissioner over the Minor Leagues are as broad and as binding as those granted to him over the Major Leagues. In matters of less than $300, he does not have either original nor appellate jurisdiction, but this appears to be the only real limitation placed upon him which he otherwise possesses under the Major League Agreement.

In addition to the commissioner, there is also provision made for an Advisory Council similar to the one specified in the Major League Agreement. When this Council is determining any Major-Minor League matters, the Minor Leagues are to be represented by two members selected by the National Association of Professional Baseball Leagues. This Council is required to submit to the Major-Minor Leagues, the following proposals for adoption:

1. Rules to regulate all contracts between the Major and the Minor Leagues and all matters in which these Leagues have an interest.

2. Rules to determine the relationships between players and clubs and between clubs and clubs, in all cases which concern players or their contracts.

3. A standard form of contract for players and such other formal documents as may, from time to time, be necessary.

A clause identical with that appearing in the Major League Agreement concerning the submission of disputes by the parties to the commissioner and their agreement to be bound by his decisions appears in the Major-Minor League Agreement.[8] There is also a provision requiring all contracts to provide for submission of disputes by the parties to the jurisdiction of the commissioner.

Article V of this agreement provides for selection of Minor League players (by Major League Clubs); a scale of prices is fixed for players of each class. A provision limits the periods of the year when selections may be made; the number of players who may be selected; the right to return a player; and the method by which payment is to be made. There are also specifications concerning the right to sign college players. In fact, every effort is made to clearly define the rights, duties and liabilities of all parties concerned so that misunderstandings and disputes may be eliminated as far as possible.

The period of duration of this agreement is for the length of service of the Honorable Kenesaw M. Landis, as Commissioner.[9] It should be observed that in this respect it differs from that of the Major Leagues Agreement which specifies a period of twenty-five years.

The commissioner of baseball is vested with great power for the purpose of preserving the reputation of the great American pastime and of preventing and punishing acts which are detrimental to any phase of the game. That this power of the commissioner is vested as a result of the two contracts is significant. The Major Leagues Agreement governs all questions and disputes involving any matter solely within the interest of either or both of these Leagues. But such an agreement would fall short of providing for questions and disputes involving professional baseball as a whole, since the Minor Leagues were not parties to it. A Major-

8. See Birdseye's Abbot's, op. cit., p. 1888.
9. See Birdseye's Abbot's, op. cit., p. 1889.

Minor Leagues Agreement was therefore essential if an endeavor was to be made to provide peace and harmony throughout the American baseball world.

The opportunity for disputes to arise in a business of this nature was unlimited unless a strong central authority was provided.[10] Likewise the opportunity for dishonesty, harmful not only to members of the sport and the owners themselves, but to the baseball public as well, was ever present. A powerful authoritative force was deemed essential to prevent this element from thriving and to place this form of sport upon a high plane of decency. Many matters occurring in baseball require the use of tact and the absence of publicity. They are of a confidential nature and the best interests of the game can be most successfully preserved by keeping such matters out of courts of law. In the writer's opinion such a requisite is met by decisions of a commissioner who conducts a hearing closed to the public and the press. Hearings of this nature may frequently be frowned upon by a certain group of the public but the nature of the controversy demands that they be continued.

The Baseball Agreements and the Courts. The legality of these agreements has not as yet been tested by the courts. Quite recently a case has arisen which may decide the matter.[11] The St. Louis National League Club requested an injunction to restrain Commissioner Landis from carrying out his order to that Club either to keep Fred Bennett as a member of its club, release him to the other Major League teams or declare him a free agent. This the St. Louis Club refused to do and brought suit for an injunction to restrain Commissioner Landis from enforcing his order. In the meantime Bennett continued on the Milwaukee team.

At the trial of the case before Justice Lindley, of the United States District Court sitting in Chicago, Mr. Miller, legal counsel for Commissioner Landis, made the following significant statement:[12]

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10. See article entitled "Judge Landis, New Czar of Baseballdom," op. cit., p. 46.
11. See New York Tribune, Sports Section, Feb. 7, 1931.
12. See New York Tribune, Sports Section, Feb. 7, 1931.

"'As long as Mr. Landis is commissioner of organized baseball, those clubs belonging to the organization now known as the National Association of Professional Baseball Leagues must abide by his edicts right or wrong. . . . The commissioner doesn't have to wait for any complaints. If he suspects anything detrimental to the best interests of baseball it not only is his right but his duty to investigate and take whatever remedial or punitive action he deems necessary.'"

The counsel for Commissioner Landis explained, however, that he intended to prove that the Commissioner's action was correct in this instance. Nevertheless he went on to say that even if the Commissioner's action was wrong, the St. Louis and Milwaukee Clubs would be forced to accept it because of the absolute powers they conferred to the Commissioner when he accepted his office in 1921. To substantiate his statement concerning the Commissioner's power in these matters he read all the rules pertaining thereto and called attention to the fact that, even down to each player's contract, there is a provision that the contract must be approved by Commissioner Landis.

It would appear that since the clubs of various leagues have been parties to the Major League and Major-Minor League agreements which vest the powers of a dictator upon Commissioner Landis that they are bound by the terms of their agreements, and having waived their right of recourse to the courts, must abide by terms until the agreements expire. There is apparently no evidence showing coercion was used to procure the agreement. So long as the commissioner does not exceed the scope of his authority, (which is quite extensive) he appears to have the absolute right to decide many questions over a wide range of subjects.

There is evidence that the establishment of a dictatorship in this field has been beneficial.[13] It has done much to stabilize the industry. There are no charges of dishonesty and corruption under the commissioner. There is little evidence of friction or discontent. These are healthy signs in an industry which was formerly honeycombed by disrupting influences. A total elimination of disputes is desirable but cannot be expected; a decrease in the number indicates progress. If, as the writer feels, a dictatorship

13. See Birdseye's Abbot's, op. cit., p. 1885.

is the only means of securing these changes, the benefits secured warrant the change.

The Motion Picture Dictatorship.

The baseball agreements of 1921 were followed by the organization of the Motion Picture Producers and Distributors of America, Inc., in 1922. This organization was formed under the Board of Trade Article of the New York Membership Corporation Law. Mr. Will H. Hays, then Postmaster General of the United States, was elected president. He was given unusual powers in the endeavor to improve some of the unfortunate conditions existing in the motion picture industry.

Some of the most important abuses[14] in the motion picture industry prior to Mr. Hays' becoming head of the industry were:

1. The unauthorized exhibition of a film production in a theatre to which it had not been leased. This was called "bicycling" or "two-waying" of pictures.

2. The unwarranted refusal of a distributor to deliver films to an exhibitor after the latter had booked the film and advertised its showing weeks ahead of time, thus causing the exhibitor to acquire a bad reputation with the public.

3. Refusals on the part of exhibitors to return films to the distributor by a certain date. In many instances this prevented the distributor from performing his contracts with other exhibitors concerning these films.

4. Damage caused to films by the negligence of the exhibitor's operator which the exhibitor refuses to pay for.

5. The delivery of damaged films by the distributor to the exhibitor causing a loss of public patronage to the exhibitor.

6. Refusal of exhibitor to make a correct accounting to the distributor where the films are leased on a percentage of gross receipts obtained from an exhibition of the picture.

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14. See pamphlet entitled, "The Practical Operation of Boards of Arbitration in the Motion Picture Industry" by Metzger, C. R., of the Indianapolis Bar, p. 12.

7. Transfer of title of a motion picture theatre to a "straw-man" in order to avoid the showing of pictures which had previously been leased from that theatre.

These and many similar abuses not only affected the two parties to the contract but also had a detrimental effect upon other innocent parties throughout the industry. The public also was affected and the industry was rapidly acquiring a poor reputation in many sections of the country. Not only were these abuses prevalent between producers, distributors and exhibitors through their contractual relations but also there was a growing need for censorship of films and for a regulation of the personal conduct of motion picture actors and actresses. This also was a factor which affected the entire industry. A strong central authority was needed to supply stringent regulation.

Since this thesis deals with the settlement of commercial disputes, a small amount of space may be given to the method adopted for the correction and settlement of practices growing out of contracts between exhibitors and distributors. Two elements were essentially responsible for the system devised. One, the desire to prevent abuses; the other, the necessity for settling disputes growing out of alleged abuses in as speedy a manner as possible. A speedy settlement of disputes in this industry is essential as delay affects other innocent parties in greater numbers the more it is prolonged. Arbitration was one of the methods adopted to deal effectively with both elements.

Methods of Establishing an Arbitration System in the Motion Picture Industry. In order to establish an effective arbitration system, three steps had to be taken.[15]

1. The adoption of a standard form of contract, with a clause requiring the parties to submit the dispute to arbitration is essential in all dealings between distributor and exhibitor.

2. The establishment of adequate machinery to handle the arbitrations in a speedy and effective manner.

3. An effective method for enforcing awards once they are rendered.

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15. See pamphlet by Metzger, C. R., op. cit., pp. 6-12.

The first of these steps was not difficult. A standard form of contract was drawn with an arbitration clause incorporated therein. This was adopted by the Motion Picture Producers and Distributors of America, Inc., and thereafter its distributor members required all exhibitors to whom they leased films to sign such a contract.[16]

Prior to the adoption of the Standard Exhibition Contract each distributor had his own contract which was very different from the contracts of the other distributors. These differences of contracts were the cause of a large amount of confusion in the motion picture industry since neither the distributor nor exhibitor was entirely sure as to his rights and obligations under such contracts.[17] A uniform standard contract therefore was looked upon as one means of eliminating unnecessary disputes. The standard contract clearly defines all of the rights, duties and liabilities of the parties. It is very comprehensive and was evidently intended to leave no phase of the transaction open to conjecture. The arbitration clause aforementioned provides that before either party resorts to any court to protect his legal rights, he shall submit all claims arising out of the contract to the Board of Arbitrators provided for by the rules[18] of the Motion Picture Producers and Distributors of America, Inc. The parties are required to agree further to comply with the award of such board, to consent that such award shall be enforceable in any court of competent jurisdiction pursuant to the laws of such jurisdiction; to waive the right of trial by jury upon any issue arising under this contract; and to accept as conclusive the findings of fact made by such board even to the extent that they may be introduced in evidence in any judicial proceeding. It is therefore evident that the parties are firmly bound by arbitration. Provision is also made for a method of compelling the parties to submit their dispute to the Board of Arbitration. This matter will be discussed at more length hereafter.

The parties having bound themselves to arbitrate disputes aris-

16. A copy of this contract is on file at the American Arbitration Association, 521 Fifth Ave., New York City, N. Y., or may be procured from any of the Film Boards of Trade.

17. See pamphlet by Metzger, C. R., op. cit., pp. 6-7.

18. A copy of these rules is on file at the office of the American Arbitration Association, 521 Fifth Avenue, New York City, N. Y.

ing out of the contract, the next step was the establishment of arbitral machinery to determine the disputes. To accomplish this purpose, Film Boards of Trade were established as a department of the Motion Picture Producers and Distributors of America, Inc.[19] The central office of the Film Boards of Trade is located in New York City and there are branches in thirty-two of the principal cities in the United States. These boards began to function in 1923. The Film Boards of Trade were empowered to create Boards of Arbitration composed of three bona fide distributors and three bona fide exhibitors, each connected in no way with any other branch of the industry. The disputes are required to be submitted to these Boards of Arbitration whose decision is rendered by majority vote. In the event of a tie vote by the Board upon any case, a majority of the board may elect a seventh member to sit with the board and assist it in arriving at a decision. In the event that a seventh member cannot be selected by this method, the president of the local chamber of commerce or the mayor of the city in which the board is sitting is empowered to make the necessary selection. The Board of Arbitration having been created, it proceeds to conduct hearings once a week, at which time complaints arising during that week are heard and determined.[20]

In cases where both parties willingly submit their dispute to the Board of Arbitration and obey the award, stringent enforcement measures are not needed. Such measures, however, must be employed where one of the parties refuses either to submit to arbitration or to obey the award. The successful operation of the arbitration plan has been due to the enforcement plan.[21]

Under this plan, if the distributor fails to: (1) submit a controversy arising under the contract to the Board of Arbitration; (2) refuses to comply with the award of the board; (3) or has been found to have committed a breach of a contract which, in the opinion of the board, justifies an exhibitor in refusing to have further dealings with such distributor, the following courses[22] are

19. See pamphlet by Metzger, C. R., op. cit., pp. 6, 7.
20. For details concerning the procedure, see pamphlet by Metzger, C. R., op. cit., pp. 9-12.
21. For details of plan, see ibid., pp. 15-16.
22. See article by Metzger, C. R., op. cit., p. 15.

open to compel the distributor to reinstate himself in good standing with the board:

1. The Board of Arbitration will refuse to consider any case wherein the distributor is the complainant.

2. The exhibitor may at his option terminate all existing contracts between the exhibitor and the distributor by giving notice to that effect within two weeks after such finding.

3. The Board of Arbitration may order the main office of the distributors to compel the distributor to comply with the award.

If the exhibitor is guilty of failure to submit a matter to arbitration, or to comply with an award, the following[23] may be taken against him to compel such obedience:

1. All of the distributor members of the association having contracts with the exhibitor are notified that he has refused to honor his obligations and they may require him to furnish each of them with security to the amount of $500, to insure his compliance with the terms of the contracts which he has made with them. This security requirement is provided for in the standard exhibition contract which the exhibiter has been required to sign in order to lease films from the distributors. Upon the failure of exhibitor to give proper security each distributor may suspend film service to him.

2. Recommendation may be made to the exhibitor's organization that they take disciplinary action against the delinquent exhibitor in order that he may reinstate himself in good standing in the motion picture industry.

The first method stated above was formulated upon the theory that the delinquent distributor had become a bad "risk" and that a deposit of security was needed to protect all other distributors, with whom he had contracts, from loss due to a possible breach of his contracts with them. This undoubtedly is an effective method of securing compliance with an award, as many exhibitors are not in a position to place the cash deposits required with ten

23. Ibid, pp. 15-16.

or more distributors with whom the average exhibitor has regular contracts.

The Legality of the Motion Picture Arbitration System. The Attorney-General of the United States believed that this system was unlawful in that it violated Section 1 of the Sherman Anti-Trust Act.[24] In 1929 a bill in equity praying for an injunction was brought by the Attorney-General of the United States against the Paramount Famous Lasky Corporation, nine other corporations engaged in the distribution of motion picture films, the Motion Picture Producers and Distributors, Inc., and thirty-two film boards of trade, maintained by the defendant distributors and other distributors of motion picture films in thirty-two principal cities of the United States.[25]

Justice Thacher granted the injunction. He held that the defendants were guilty of a conspiracy to restrain interstate commerce. The conspiracy was predicated upon acts of the defendants in adopting and agreeing to use exclusively the uniform exhibition contract by which exhibitors were required to submit to arbitration and obey the award under penalty of making a deposit to each distributor with whom each had an unfulfilled lease of films. The important steps in the reasoning of Justice Thacher in in support of the decision are:

1. The members of the Film Boards of Trade distribute approximately 98 per cent of the motion picture films distributed annually in the United States. It is therefore impossible for any exhibitor to secure sufficient films for the operation of his theatre unless he deals with one or more members of a Film Board of Trade. The average exhibitor contracts in the course of a year with from five to fifteen distributors.

2. In September, 1927, the Federal Trade Commission invited those engaged in producing, distributing, and exhibiting motion pictures in the United States to attend a trade practice conference in New York City. The purpose of this conference was to devise

24. 26 Stat. 209 (15 U. S. C. A.) (1890).
25. United States v. Paramount Famous Lasky Corporation et al, 34 Fed. 2(d) 984 (1929).

means whereby unfair methods of competition might be eliminated from the motion picture industry. At this conference a resolution was passed, with only one dissenting vote, expressing the desire of all branches of the industry that a uniform exhibition contract be used and that it contain provisions for arbitration. Provision was also made in the resolution for the appointment of a committee of nine to make any revisions in the existing standard exhibitions contract and the rules for its enforcement. After consideration, the Federal Trade Commission approved the resolution, and pursuant to it the committee was appointed. Of this committee three were distributor delegates, three were exhibitor delegates and three were exhibitor delegates who were affiliated in one way or another with distributors. The latter three did not have the right to vote by direction of the resolution. This committee after protracted conferences agreed upon the standard exhibition contract the terms of which have been previously discussed.[26] This contract was immediately put into force by the distributors. Thus it is apparent that its terms were never submitted for approval to the exhibitors who individually were compelled to sign it in order to obtain a new lease of films.

3. Since many exhibitors were not represented at the conference at which the above resolution was passed nor have they given their consent to the terms of standard exhibition contract, their inability to obtain films unless they agree to its terms constitutes a restraint upon their right to trade.

4. Assuming that the provisions for arbitration were reasonable in operation, the requirement for a deposit as security by an exhibitor who does not abide by an award is coercive. This is so because if he does not make the deposit with all distributors with whom he has unfulfilled contracts they are at liberty to suspend film service to him. He must, therefore, either comply with the award, give the proper security to all distributors with whom he has contracts or close up his theatre. His opportunity to trade is, therefore, not only restrained but unreasonably restrained by a combination of distributors who compel him to contract accord-

26. Supra, pp. 178-181.

ing to their terms or not to trade at all, insofar as motion picture films are concerned.

The distributors' organizations appealed the case to the United States Supreme Court which upheld the decision of Justice Thacher.

The following statements of Justice Thacher in the decision in the lower court are significant:

"Nothing that has been said should be taken in derogation of the right of trade of commercial groups, or of traders generally, to voluntarily impose upon themselves standard forms of agreement which do not unduly restrict competition and thus restrain trade, or to agree that all controversies arising between them shall be settled by arbitration. Such agreements dealing only with the rights of those who execute and intend to be bound by them are normal and usual, and are proper instruments in the lawful conduct of trade. It is only when such agreements are sought to be imposed upon others, regardless of their wishes, by coercive combinations having the power to say 'Take what is offered or get nothing,' that they become illegal.

"Upon settlement of the decree the parties may suggest provisions, if such be feasible, under which uniform contracts containing arbitration clauses may be voluntarily adopted by the members of this industry without coercion or other unlawful restraint."

From what has been said by the court in this case, the compulsory arbitration feature together with the deposit requirement provided for in the standard exhibition contract is illegal because by the agreement of a combination of distributors controlling 98 per cent of the films distributed, all exhibitors were compelled to submit to unreasonable restraint of their freedom to procure motion picture films. As a result of this injunction, the standard contract was abandoned. The various distributors are now licensing films on their own individual contract forms, most of which contain clauses for voluntary arbitration.

The defendants in this case presented evidence to the court that the use of the standard exhibition contract and the arbitration system which was established had benefited the industry as a whole in that it had reduced abusive practices and had raised standards and ethics in the industry generally. In this connection Justice Thacher, in his opinion, said that he found ample proof of the benefits to the industry. It is to be regretted that the compulsory

element was present in this system as the gains which accrued were considerable.

There is no doubt that the arbitration system was effective. For instance, in the year 1929, 30,746 claims involving $8,956,243.07 were filed with the various Boards of Arbitration throughout the United States.[27] Of these, 7,223 involving $2,816,766.16 were decided by the arbitrators, the remaining having been settled or withdrawn before the date set for the hearing, or were still pending on the last day of the year. Of the 7,223 awards rendered, 107 or less than 1½ per cent required court proceedings for enforcement. This indicates that in over 98½ per cent of the awards rendered the parties obeyed the award. It would be interesting to ascertain in what percentage of these cases the awards were obeyed because of the deposit requirements, but this information is not available. Of the 7,223 awards rendered, 682 were rendered against distributors and 6,541 against exhibitors. In this connection it is significant that the 78 per cent of the number of claims filed by exhibitors against distributors; while the number of awards rendered in favor of distributors represents 21 per cent of the number of claims filed by distributors against exhibitors. This indicates that if the claims were settled on their merits, almost four times as many unjustifiable claims were brought by distributors as exhibitors.

The Future of Arbitration in the Motion Picture Industry. Since the provisions for arbitration must be voluntary, the future of arbitration in the motion picture industry in the opinion of the writer is dependent upon several factors. First, it depends upon the willingness of exhibitors to agree to arbitrate. It is apparent that the distributors desire arbitration or they would not have combined to compel the exhibitors to agree to it. Second, it depends, in many states, upon the willingness of the parties to submit to arbitration even though they have signed a contract containing an arbitration clause. This is so because in many states agreements to arbitrate future disputes are revocable by either party before an award has been rendered. It is desirable to recall, however, that in Pennsyl-

27. These, as well as subsequent figures concerning the motion picture industry were furnished by J. H. Greenburg, Secretary of the Philadelphia Film Board of Trade.

vania and ten other states the parties are bound by the agreement to arbitrate future disputes and that the courts are authorized to assist in the enforcement of such agreements.

In those states which have not adopted effective arbitration statutes, some extra-judicial method will have to be created to make it desirable for the parties to abide by their voluntary agreement to arbitrate or else the benefits to be derived from this practice will be lost. This might be accomplished by the establishment of trade bodies to which both distributors and exhibitors are members and by the by-laws of which all parties are bound to honor their arbitration agreements. Some plan would have to be formulated to make membership in such an organization desirable from the standpoint of both distributors and exhibitors. Much careful thought will be required to devise a method to overcome the present obstacles,

The Credit System in the Motion Picture Industry. Before leaving the subject of the motion picture industry it is desirable to point out another recent ruling of the United States Supreme Court which has created an obstacle to another type of compulsory method used to abolish abuses in this industry. A description of this method is included as a contrast to the arbitration system. In 1926 the Motion Picture Producers and Distributors of America, Inc., caused each of the thirty-two Film Boards of Trade to adopt rules for the establishment of a local credit committee, which committees were promptly organized. It was their duty to investigate and report to the Secretary of their Film Board of Trade the names of all persons who have acquired, by purchase or transfer, motion picture theatres in the territory within which the Film Board of Trade operates. The secretary of the Film Board placed these names upon a "credit information list," copies of which were furnished to all members of the Film Board for their confidential information. Each member upon receipt of such list was to advise the secretary concerning his existing contracts for exhibition of films at the listed theatre and to state whether the terms of the transfer of the theatre provided that the new owner was to assume existing contracts. A questionnaire concerning credit was sent to

the new owner which he was required to answer and return to the Secretary of the Film Board.

The credit committee after investigation determined whether the sale of the theatre was made for the purpose of avoiding uncompleted contracts for films. If they determined that it was, they noted this fact upon the credit information list. The committee also noted upon this list an amount not to exceed $1,000 opposite the name of each theatre whose new owner had not agreed in writing to honor the uncompleted contracts of that theatre. This amount specified was in the opinion of the committee a proper sum which all distributors should require the new owner to deposit before they would enter into a contract with him for new films. The rules of the Film Board of Trade provided that no distributor, under penalty of expulsion from membership, should enter into any new contract with the transferee of a theatre unless such deposit was required. It was also provided that the credit committee could from time to time remove the name of a theatre owner from this list, after which the distributors were not required to obtain a deposit as security.

The Department of Justice of the United States, believing this practice to be a conspiracy in restraint of trade as provided in the Sherman Anti-Trust Act, brought a bill in equity in the United States District Court for an injunction to prohibit this practice. The parties defendant were the same as those in the *Paramount Famous Lasky Case* although this case is referred to in the Supreme Court Reports as *United States v. First National Pictures, Inc.*[28] This case also came before Justice Thacher in the United States District Court.[29] He refused to grant the injunction on the ground that such practices were not unreasonable or unlawful in restraint of interstate commerce.

The following statements from Justice Thacher's opinion are significant:

"In the instant case all the badges of unreasonable restraint are lacking. There is no suppression of competition, nor any attempt to monopolize. No

28. United States Supreme Court Advance Opinions, 1930 Term, No. 2, p. 61.
29. 34 Fed. (2d) 815 (1929).

one has complained, except the government. No injury to individual traders or to the public generally is disclosed. On the contrary, serious trade abuses have been eliminated, and both exhibitors and distributors have been benefited. Fraudulent transfers, designed to avoid the performance of contracts involving interstate commerce, have been discouraged. Exhibitors have been disuaded from overbooking, a practice not infrquently indulged in to exclude the competition of new theatres. Reasonable arrangements have been encouraged under which persons acquiring theatres for which films have been booked long in advance have assumed the performance of existing contracts, thus avoiding serious interruption of interstate trade, inherent in the old abuses. There is no evidence of oppression, no intent to drive out or exclude any one from the business of exhibiting motion pictures.

"The repudiation of pending contracts by a theater owner almost always involved the interests of several distributors. These interests were substantial. During the year 1927 the aggregate rentals involved in uncompleted contracts of theaters transferred to new owners was $7,297,374.15, and in 1928 the sum was $9,843,970.23. It was natural and normal, therefore, that agencies representing all of the distributors should be employed to deal with such cases, in an effort to arrive at an adjustment which should be fair and reasonable to all concerned.

"In most cases the former owner, who had repudiated his contracts, was financially irresponsible, and the obvious business task involved was to persuade the new owner, who was continuing the same business, to make a fair adjustment of the old contracts. . . . Distributors, it appears from the evidence, were always willing to meet the exhibitor's business necessities to scale down the contract requirements, and, if desired, to substitute other pictures for those contracted for. And the credit committee undertook to make such adjustments in behalf of all the distributors involved. It was only in rare instances, usually either in cases where colourable transfers of title had been fraudulently made to escape the owner's contracts, or in cases where the new owner preferred to comply with the demands for security, that such situations were not soon adjusted to the satisfaction of all concerned and the posting of security waived.

"It should be remembered that, when a theater owner who has contracted to exhibit films in his theaters disables himself from performing his contractual obligations by conveying his theater to another, his deliberate breach of contract is apparent. The purchaser, who must be assumed to have knowledge of the business upon which he is about to embark, almost certainly knows that any going theater has such contracts outstanding, and that the conveyance of the theater without any assumption of these obligations will necessarily result in their breach. . . . Such restraints as may have resulted from what was done were incidental to this legitimate purpose, and therefore not unreasonable or unlawful."

The Attorney-General of the United States appealed from the decision of the District Court and despite the reasoning of Justice Thacher, the Supreme Court of the United States decreed that the injunction be granted. The Supreme Court held as follows:

"The obvious purpose of the arrangement is to restrict the liberty of those who have representatives on the film board and secure their concerted action for the purpose of coercing certain purchasers of theatres by excluding them from the opportunity to deal in a free and untrammelled market.

"Reference to what has just been said in No. 83 and to the opinions in Eastern States Retail Lumber Dealers' Asso. v. United States, 234 U. S. 600, 58 L. ed. 1490, L. R. A. 1915A, 788, 34 S. Ct. 951; United States v. American Oil Co., 262 U. S. 371, 67 L. ed, 1035, 43 S. Ct. 607; Binderup v. Pathe Exch. 263 U. S. 291, 68 L. ed. 308, 44 S. Ct. 96; and Anderson v. Shipowners Asso., 272 U. S. 359, 71 L. ed, 298, 47 S. Ct. 125, will suffice, we think, to show the challenged arrangement conflicts with the Sherman Act."[30]

The combination of the distributors in which the exhibitors had no voice apparently led the court to view the arrangmeent as a conspiracy unreasonably to restrain interstate commerce in violation of the Sherman Anti-Trust Act. In the writer's opinion, nothing in the decision of the court would prevent individual distributors from requiring a new owner of a motion picture theatre to place a deposit as security before films would be leased to him on a new contract. Although this right apparently exists, it ceases to have any practical value unless other distributors require similar deposits. As previously suggested, some form of organization composed of both distributors and exhibitors is necessary by the rules of which abuses practiced by both distributors and exhibitors may be reduced to a minimum.

The Dictatorship in the Theatrical Business.

The first two dictatorships were described in more detail than those which are to follow. In the former, the methods used had a direct connection with arbitration, while the latter employ arbitration to a less degree. In the four dictatorships yet to be described, little more is attempted than a brief discussion of the methods employed in each industry involved to correct the abusive practices which have crept in and which threaten the business welfare of these industries.

30. Supra, footnote 28.

In 1922, the Producing Managers' Association, Inc., determined to eliminate abuses in the production of theatricals. There appeared to be a need for a strong central authority, with all the attendant rights and powers, to preside over the industry as a whole. Such authority was granted to Mr. Augustus Thomas on August 1, 1922, by an agreement drawn between the Producing Managers' Association and Mr. Thomas.

The terms of this agreement[31] are:

1. The Producing Managers' Association employs Mr. Thomas to act as Executive Chairman of its Board of Directors.

2. The Executive Chairman is to do for the government of the Association such work as customarily is done by the presiding executive of a corporation, in dealings with members of the association and in dealings with other associations or individuals.

3. The Executive Chairman agrees to make this work his exclusive business except for his present vocation of playwriting.

In this amusement industry a dictator was selected from within the industry itself. This is in contrast with the two previous dictatorships, in each of which centralized authority was vested in a person chosen from outside the industry. It is significant that the dictator as described in this agreement is to perform such services for the industry as the presiding executive of a corporation is to perform for the corporation. The powers of this Executive Chairman are therefore quite broad.

The Dictatorship in Two Branches of the Women's Garment Industries.

There are two branches of the women's garment industries in which dictatorships have been established. The first branch to employ this method of regulation was the branch represented by the Associated Dress Industries of America, which organization is composed of manufacturers of women's dresses. The other branch represented by the United Women's Wear League of America is composed of manufacturers of women's waists, neckwear, under-

31. For text of this agreement see Birdseye's Abbot's, op. cit., p. 1891.

wear, hosiery and children's wear of all sorts. A brief description will be given of the organization, methods and functions of the dictatorship in each of these branches.

The Associated Dress Industries of America.[32] Prior to the establishment of a dictatorship in this branch of the industry it is said there were practically no business ethics recognized. Trade practices were unprincipled and many cases between members of this industry were in litigation. The few attempts to organize the industry through the establishment of effective trade bodies were fruitless. The type of business involved was of a rather speculative nature. This was caused by the rapid change of styles, in color, design and fabric used in women's wear.

Very little capital was required to start in this type of business and consequently many inexperienced and unprincipled manufacturers and retailers were attracted to the industry. This resulted in many trade abuses being practiced, among which were copying of styles, cutting of prices, granting excessive discounts, unwarranted cancellation of contracts, giving of bribes to buyers, delivery of goods of different quality than ordered, shortages in deliveries and kindred abuses. The industries had reached such a deplorable condition that the life of the average manufacturing concern was from three to five years. Bankruptcies were quite frequent. This necessitated the dumping of stocks of merchandise upon the market which caused serious deflation of prices entailing losses to solvent concerns.

Conditions in this industry became so bad that a group of the most influential members decided to seek the services of Mr. David Mosessohn, a man known to most of them, who had demonstrated his ability as District Attorney of Portland, Oregon. They conferred with Mr. Mosessohn, and he agreed to accept the responsibility of directing the destinies of the industry. After a careful study of the conditions of the industry it was apparent that a trade association, composed of as many members of the trade as possible, be formed.

32. The information concerning this industry was obtained from Mr. M. D. Mosessohn, through Mr. Bernard Segal of the Department of Political Science, Wharton School, University of Pennsylvania.

One of the first steps in accomplishing this purpose was the formation of the Associated Dress Industries of America. This organization is composed of two types of members, active and associate. The active members are manufacturers and wholesalers of women's dresses and ready-to-wear garments. The associate members are piece goods manufacturers, owners of dye factories, style artists' organizations, bankers doing business with members of the organization, and other persons who have business dealings with members. This organization has a membership of over 800, about 85 per cent of whom are located in New York City.

The Associated Dress Industries of America has an Advisory Council, an Executive Council and an Executive Chairman. The Advisory Council is composed of fifty members elected each year by an annual assembly. Its membership at first was twenty-five but was later increased. When this council was first created, it held a meeting once a month, but now it meets but once a year unless called to a special session by the Executive Chairman.

The Executive Council is composed of the Executive Chairman and ten members chosen by and from the Advisory Council. The Executive Council acts in an advisory capacity to the Executive Chairman. Its decisions, however, are not binding upon him.

The Executive Chairman has two types of duties, the one of an executive nature, the other of administration. In his executive capacity he adjusts differences in the industry either by arbitration, where he sits as the sole arbiter, or by mediation. His administrative duties deal with supplying credit information to members and assisting them in collections of claims against individuals and companies not associated with the industry, such as express companies, steamship companies, etc.

Arbitration is sometimes resorted to but is limited to those cases in which the garment manufacturer and the producer of raw materials are parties to the dispute. Formerly these disputes were brought before an arbitration board composed of the Executive Chairman, and two garment manufacturers and two producers of raw material who served as advisers to the Executive Chairman. Now the Chairman usually hears the case alone. It is rather sur-

prising that his decisions are not binding, but the writer has been informed that his rulings were obeyed in all but three instances in 1929. The result of these arbitrations has been the maintenance of friendly relations between the disputants.

Another duty of the Executive Chairman concerns adjustments between member manufacturers and any one else concerning any dispute except one involving labor problems. These adjustments usually concern disputes between a member and a retailer over goods, which by the terms of the contract are permitted to be returned. In adjustment cases the parties are not bound to abide by his rulings, but they usually do.

A third function of the Executive Chairman, and one of the most important, deals with insolvent debtors who owe money to any member. In this capacity the Chairman has an analysis made of the debtor's business to ascertain if he is honest and if his business may be reorganized so that he may eventually be able to pay his debt. If the Chairman finds that the debtor is honest and that a reorganization of his business is possible, he calls the creditors together and if possible obtains an extension of credit for the debtor. Strict supervision is thereafter maintained over the debtor's business until he becomes solvent. In this manner the debtor who is usually a retailer is kept in business and the creditors eventually obtain the full amount of their claims. Both parties thus derive a benefit. The writer is informed that surprising results have been obtained from this method. The reorganization of the debtor's business is generally accomplished by suggestion of economies, by reducing overhead expenses, special sales methods, changes in policy, etc.

Another function of the Chairman deals with the elimination of trade abuses. The abuses practiced by the retailer are generally unwarranted cancellations, unjust returns of merchandise, demanding of unfair discounts, and overbuying. The most common abuses of manufacturers are misrepresentations of merchandise, late deliveries, selling competitors of retailer when an exclusive purchase was promised the buyer, delivery of imperfect merchandise and accepting orders which cannot be filled to prevent competitors from

obtaining the sale. A Trade Abuse Bureau over which the Executive Chairman presides has been established. To this Bureau any retailer or member may present his case. When a claim of a trade abuse has been reported, the Chairman examines the records and ascertains if the person alleged to have perpetrated the abuse has been previously accused. If it is found that such is the case, the Chairman orders that the practice be stopped or more drastic measures will be taken. If the person accused is not a frequent offender, there is generally no difficulty in securing a proper adjustment.

A Credit Bureau has been organized through the efforts of the Chairman. Credit sheets are sent to all members every day. These sheets list all past due accounts, thus enabling the members to determine for themselves if they desire to extend any more credit to those who are delinquent in their accounts with other firms. A red sheet is issued every second week which lists accounts in extreme danger. Details concerning these accounts may be obtained upon inquiry. This system has prevented many losses in the industry.

The Executive Chairman or the dictator has done much to bring order out of chaos to this industry. His success is apparently due to his skill as an organizer and to the policies which he has adopted. Not being a member of any one group in the industry, he is not likely to be partial. Coming into the industry from outside, he was able to get a perspective view of the needs of the entire industry, and then to proceed properly to organize it. It is considered by many that the industry is upon a much sounder and healthier basis today than it was before Mr. Mosessohn accepted the position of Executive Chairman.

The United Women's Wear League of America.[33] What has been said concerning the need for central authority to overcome trade abuses and to save an industry from demoralization in the women's dress industry applies as well to the conditions which existed in the women's apparel industries before the creation of a

33. The information concerning the dictatorship in this industry was obtained from Mr. M. D. Mosessohn, through Mr. Bernard Segal, of the Department of Political Science, Wharton School, University of Pennsylvania.

dictatorship in the latter. The United Waist League, a trade organization of manufacturers, which at that time was the strongest organization in the industry, requested Mr. M. D. Mosessohn, a brother of the dictator of the dress industries, to become the Executive Secretary of that body. Mr. Mosessohn at that time was a newspaper publisher, lawyer and President of the Oregon Chamber of Commerce. He accepted the position and proceeded to make a careful study of the conditions existing in the industry.

One of the first steps in organizing the industry was the establishment of the United Women's Wear League of America, which absorbed the United Waist League and other similar organizations. This League now is composed of the following organizations:

United Infants', Children's and Junior League of America.

United Waist League of America.

United Women's Neckwear League of America.

United Underwear League of America.

Hosiery, Underwear and Dry Goods League.

Associated Organizations, such as the National Council for Dyers and Colors.

The members of these subsidiary organizations are members of the League. They meet in annual assembly and elect an Advisory Council similar to that of the Associated Industries of America. Each of the subsidiary organizations mentioned elects an Executive Chairman and an Executive Council of its own. The Executive Chairman of each of the subsidiaries is a member of an Executive Council which serves in an advisory capacity to the Executive Chairman of the United Women's Wear League.

The duties of the Executive Chairman of the parent League encompass all general problems of the entire industry. The individual problems of each segment of the industry are handled by the Executive Chairman of the subsidiary organizations. For example, all problems dealing with the relationship of manufacturer and retailer are handled by the Chairman of the parent League,

whereas questions concerning the distribution of children's garments would be under the jurisdiction of the Chairman of the United Infants', Children's and Junior League of America.

The same type of functions are exercised by all of the executive chairmen of these organizations as are exercised by the similar officer of the Associated Dress Industries of America and for this reason will not be discussed further. Late in 1930, Mr. David Mosessohn died. The office of Executive Chairman of the Associated Dress Industries of America is being filled by his brother, who, as previously stated, holds a similar office in the United Women's Wear League.

Similar results have been obtained by the creation of a dictatorship in this branch of the industry as in the other branch.[34]

The Dictatorship in the Electrical Industry.

The condition existing in this industry which called for the appointment of a dictator should be reviewed briefly before giving a description of the powers of the dictator.[35] The building industry, with which the electrical industry was closely allied, became quite active after the close of the war. The increase in activity was caused by the previous decrease of building construction during the war period. Deflation, set in motion by the Federal Reserve System, was in full swing in 1921, but had but little effect upon the wages of labor demanded by employers. Mortgage money was not easily obtained for building projects on the basis of construction costs at that time. Competition among contractors increased and grew to almost ruinous proportions.

Contractors in all trades in the building industry soon were contracting to perform services at prices which represented little more than cost. These contracts in many instances resulted in losses, but the practice was continued with the hope that subsequent contracts would afford an opportunity to recoup the losses. The industry

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34. For more detailed information concerning this matter see a pamphlet entitled, "Are You Getting This Service," published by the United Women's Wear League of America.

35. The information presented concerning the Electrical Industry was obtained from Birdseye's Abbot's Encyclopaedia of General Business and Legal Forms, pp. 1891-1893.

assumed a speculative nature, with all the attendant evils.

In an endeavor to eliminate speculation and abusive trade practices in the industry, the following resolution[36] was passed by the Electrical Contractors' Association of New York on March 19, 1923, and by the Electrical Contractors of Brooklyn and Queens:

"Whereas, the business of electrical contracting, has developed a speculative character to such an extent as to convert it from a profitable to an unprofitable business, partly due to economic conditions and partly to the increase of speculative hazards normally inherent in the business; and

"Whereas, it is desirable to take such remedial measures as may suggest themselves by a careful survey of the situation;

"Therefore, be it Resolved that Charles L. Eidlitz be and he hereby is appointed a commissioner of this association to make such studies in whatever manner deemed best by him in consultation with the executive committee and to develop therefrom for this association ways and means of transforming the business of electrical contracting from its present highly speculative character to a regular and profitable business, free from undue speculation."

The following extracts taken from a message[37] sent by these associations to architects, engineers, general contractors and the building public are significant:

"It is confidently expected that such cooperation as Mr. Eidlitz has in mind will accomplish standardization of labor estimates of costs without in any way limiting competition; free exchange of information concerning operating costs without affecting the play of individual ingenuity and initiative; and the erection of standards of salesmanship hitherto unknown and unsuspected among electrical men.

"Heretofore salesmanship has played little part in the electrical contractor's philosophy; he has depended on a price argument; and being without standards of cost, the price quoted could have but faint relation to cost.

"With standards set up by cooperation such as it is possible for Mr. Eidlitz to establish, the electrical contractor can devote his energies and abilities to create character, personality and good-will for his business, which after all are the foundations of all successful business enterprises.

"Cooperation demands organization; organization demands leadership; leadership demands subordination of the individual; and subordination of the individual demands courage of the highest order. Courage produces character, and character produces good-will, and finally, good-will produces stability and profit.

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36. See Birdseye's Abbot's, op. cit., p. 1892.
37. Ibid., pp. 1892, 1893.

"The building industry in general, and the electrical construction industry in particular, needs four things: *Cooperation—coordination—standardization—stabilization.* When these four elements are attained, good-will, personality and character will be the gains."

Summary

This chapter has dealt with the establishment of six dictatorships in as many industries. The first of these discussed was the one established in professional baseball, of which the Honorable Kenesaw M. Landis is the commissioner or dictator. A need was felt for the establishment of a dictatorship in this sport after the scandals of the 1920 World Series games were exposed. The rights, duties and powers of Commissioner Landis are granted to him through the formation of two agreements: the one, the Major League Agreement; the other, the Major-Minor League Agreement. By the terms of these agreements he is empowered to investigate any transaction or practice which he may suspect to be detrimental to the game of baseball. If, as a result of his investigation he finds any such practice or transaction to exist, he may take action for its removal. His decisions in all matters are final and binding upon either leagues, clubs or individuals. The validity of this arrangement is now being contested in the courts.

The second dictatorship discussed was that of Mr. Will H. Hays in the motion picture industry. Attention in this industry was chiefly given to the types of trade abuses occurring as a result of transactions between distributors and exhibitors concerning leasing of motion picture films for exhibition purposes. The part played by the Motion Picture Producers and Distributors of America, Inc. was observed through the formation and operation of Film Boards of Trade. These Film Boards were the mediums by which disputes arising out of a breach of the terms of the standard exhibition contract were arbitrated.

The arbitration provisions in the standard contract were observed to be of a compulsory nature since exhibitors were required to agree to them in order to obtain a lease of films. A deposit of a sum of money as security was required to be given to all distributors by an exhibitor who either refused to arbitrate or failed to abide by

an arbitration award. Since these two features of the standard contract had been arranged by an agreement of distributors who controlled the distribution of 98% of motion picture films distributed annually, they were held to constitute unreasonable restraints upon interstate commerce. As a result all organizations and individuals who were requiring the use of such agreements were enjoined from their further use by a decision of the United States Supreme Court in the case of *United States v. Paramount Famous Lasky Corporation.* It would seem that some sort of arrangement should be made in conformity with the court decision and the Sherman Act.

Another deposit requirement used by Film Boards of Trade to insure distributors that buyers of motion picture theatres would abide by their future contracts, was also held to be a practice in restraint of interstate commerce and therefore prohibited. The case of *United States v. First National Pictures, Inc.* decided this point. As a result of these two decisions, individual distributors are at present using their own contracts and are making voluntary provisions for arbitration of disputes arising out of such contracts. The more important abusive practices indulged in by some members of this industry were mentioned and it was suggested that some form of trade organization including a large percentage of the exhibitors and distributors would be advisable as a means of preventing these abusive practices.

The third dictatorship was the one established by the Producing Managers' Association. Mr. Augustus Thomas was employed by the above mentioned association as Executive Chairman of the Board of Directors. In this capacity he was to study the problems of the theatrical business and to take such action as the presiding executive of a corporation would take to remove undesirable practices from the corporate enterprise.

The fourth and fifth dictatorships discussed were quite similar in many respects. The fourth dealt with the functions of Mr. David N. Mosessohn as Executive Chairman of the Associated Dress Industries of America. Upon his death, his brother, Mr. M. D. Mosessohn, Executive Chairman of the United Women's Wear

League, the fifth dictatorship discussed, succeeded to the Executive Chairmanship of the Associated Dress Industries of America. In both of these industries abusive practices had been frequently resorted to prior to the appointment of these men as dictators. In each of these industries the members of the industry meet in assembly annually, at which time they elect an Advisory Council. This council meets only once a year unless specially summoned by the dictator. An Executive Council is elected each year from the membership of the Advisory Council. This executive body acts in an advisory capacity to the Executive Chairman.

In both of these organizations disputes may be brought to the dictator for settlement. In these matters his decisions are not binding upon the parties, but are generally followed. He is not limited in his efforts concerning adjustments to disputes between members only of the association and any individual in any branch of the industry. Matters concerning insolvent debtors have been conspicuous among those handled by the dictator. Every effort is made on his part to assist insolvent but honest debtors to continue in business. Extensions of credit are frequently procured and assistance in reorganizing the debtor's business is furnished to permit such persons to reestablish their business upon a sound basis. Such methods tend to prevent losses and to promote business.

The last dictatorship was the one established in the electrical industry. Conditions in the industry were bad. To remedy this situation the Electrical Contractors' Association of New York and the Electrical Contractors of Brooklyn and Queens appointed Mr. Charles L. Eidlitz as commissioner to investigate and study the existing conditions and to develop ways and means of transforming the business of the industry from its speculative character to one of stability.

It is to be observed that dictatorships have been established in industries in which abusive practices have, for one reason or another, increased to the point where they have had serious effect upon the welfare of the members of the entire industry. These practices become so firmly rooted that they cannot be eliminated by ordinary measures. The more ethical members of the industry

find that they must organize to abolish these practices. They also realize that a strong central authority must exist in the organization. To accomplish this an executive committee is provided whose chairman is vested with power to investigate harmful practices and to take steps to eliminate them.

An analogy may be drawn between the Executive Chairman of any one of these industries and a political dictator. It is the latter's function in a period of crisis to exercise absolute authority to maintain order within the boundaries of his country. In an industry where conditions are chaotic, a dictator may be necessary to determine a policy for the entire industry which will bring about an orderly condition and will benefit the general welfare of the whole industry. Strong leadership is necessary to remedy a condition of this nature.

It is noteworthy that in four of the dictatorships, namely, baseball, motion pictures, women's dress and women's wear, the dictator was chosen from outside the ranks of the industry. It would seem that this method of selection is better for the following reasons: First, a person chosen from a field of endeavor unconnected with the industry which he is to govern is more likely to obtain a better perspective of that industry as a whole than if he had been a member of a particular branch of it for many years. Second, the members of the entire industry are more likely to feel that he will be impartial than if he had been a member of any one branch. Business men connected with one branch of any industry are likely to acquire a bias for that branch.

It is also interesting to note the type of men who have been chosen as dictators. A United States Judge, whose reputation was nation-wide and above reproach, a United States Postmaster General, of unusual ability, a District Attorney from Oregon, and his brother, also a lawyer and President of the Oregon Chamber of Commerce, both well known in their community for their ability and professional integrity, a playwright widely known in his profession, and an electrical contractor of outstanding experience in his trade, are the types of men who have been chosen to guide the destinies of six important industries.

CHAPTER VIII

Conclusions

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CHAPTER VIII

Conclusions

Disputes in business are inevitable. They have been occurring for thousands of years and will probably continue so long as human beings trade with one another. Since controversies cannot be avoided, the most suitable and effective method of settlement should be employed to dispose of them. To accomplish this, —should judicial or extra-judicial methods be resorted to?

1. *Delays in Litigation.*

The need for any extra-judicial system for adjusting commercial disputes depends upon the possibility of so changing court procedure as to secure greater speed and a greater participation of trade members in the settlement of cases affecting that trade. It is apparent that, with some exceptions, the courts of Pennsylvania do not function in an expeditious manner. It was discovered that the average length of time consumed in *assumpsit* actions is twenty-four months in four counties, eighteen months in nine counties, at least ten months in ten counties, and less than ten months in only twenty-seven counties.[1] This is a matter, however, which the courts could probably overcome by a reorganization of their rules of procedure, as has been done to a considerable degree in some instances.

2. *Need of Expert Adjudication.*

Even though all courts in the State of Pennsylvania succeeded in reducing delay as a factor in litigation to a minimum, nevertheless, the need for commercial arbitration would not be eliminated. Arbitration furnishes expert adjudication of facts at issue to a degree not possible under existing court procedure. The methods available to courts in ascertaining facts are—jury trial, and trial by a judge where a jury trial is waived. Neither method supplies experts familiar with the trade customs and practices involved

1. See Introduction, supra p. 9.

in many types of business controversy. It is conceivable that courts might so modify their procedure as to supply this need, but the probability of their doing so in the near future is rather remote.

A study of the use of arbitration in forty trade associations in Pennsylvania reveals that in every instance the arbitrators were selected from members of the trade.[2] This indicates that many parties recognize the advantages derived from a determination of commercial issues by arbitrators who are familiar with trade customs and practices and qualified to pass judgment thereon.

3. *Disordered Industry*

It appears that there exists in certain industries a wide-spread disposition to disregard orderly methods of transacting business, and that in these fields litigation as a means of correcting abuses is very ineffective. For these reasons it is apparent that if there is available some extra-judicial method which overcomes these difficulties to a measurable degree, such a method is worthy of extended trial. Commercial arbitration seems to offer very definite possibilities as a remedy.[3]

4. *Speed of Arbitration*

It has been found that resort to commercial arbitration alleviates delay.[4] An analysis of fifty cases, taken at random from the arbitration docket of the American Arbitration Association, reveals that slightly over five weeks was the average time required for disposing of these disputes. A study made of the functions of the Board of Arbitration in the Film Board of Trade shows that disputes were adjusted in the same week in which they arose. When one resorts to arbitration, there are no congested trial lists to encounter — resulting in months of delay before the dispute may even be presented for adjustment.

5. *Avoidance of Compromise*

Commercial arbitration also offers an opportunity to settle dis-

2. See Chapter V, supra, pp. 129-130.
3. See Chapter VII, supra pp. 175 and 184.
4. See Chapter VI, supra, p. 160; also Chapter V, supra, pp. 140-141.

putes upon the merits of a case rather than upon a basis of compromise. Parties to a prospective law-suit are often inclined to compromise a claim rather than institute court proceedings — with the possibility of waiting many months for the case to come to trial. The dishonest debtor prefers litigation, because the delays of litigation favor him in an effort to force his creditor to a compromise. In this connection it was found that in many trade associations in Pennsylvania, the number of disputes decreased after the association adopted a system of arbitration.[5] Similar experiences have been encountered by the American Arbitration Association,[6] and also by some English trade bodies.

6. *Preservation of Good-Will*

Arbitration tends to prevent the loss of commercial good-will. The parties have not been burdened with the expense of prolonged litigation; nor have they had a long time in which to brood over the "injustice" done them by their adversaries. The informal character of the hearing is conducive to a more friendly spirit between the parties. The study made of trade organizations,[7] the American Arbitration Association,[8] and the experiences of certain English trade bodies, proves that these advantages are preserved by the use of commercial arbitration.

7. *Maintaining Business Standards*

The same sources of information reveal that the use of this method of settlement also tends to raise business standards. Results obtained in the motion picture industry indicate that commercial arbitration has been an important factor in eliminating abusive practices in that field.[9]

8. *Conclusions Concerning Arbitration in Pennsylvania*

Pennsylvania has never made extensive use of arbitration.[10] The reasons may be summarized as follows:

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5. See Chapter V, supra, pp. 133-135.
6. See Chapter VI, supra, p. 162.
7. See Chapter V, supra, pp. 132-133.
8. See Chapter VI, supra, p 162.
9. See Chapter VI, supra, p. 162; also see Chapter VII.
10. See Chapter IV, supra, pp. 111-114.

First, — prior to 1927 the legal status of arbitration was uncertain and in many instances unsatisfactory, mainly due to an unfavorable attitude of the courts. The common law on arbitration was established in this State at an early date and was greatly influenced by early English decisions which had followed the erroneous ruling that an agreement to arbitrate was revocable at the will of either party.[11] The Legislature on twenty occasions made attempts to correct the situation in one way or another. These attempted improvements show the absence of careful analysis, either of the common law or previous statutes. They also reveal a lack of appreciation of the practical aspects of this form of procedure.

These defects were practically eliminated by the enactment of the Arbitration Act of 1927, which secured a favorable legal status for arbitration in this State.[12] This Act was drafted by parties experienced in arbitration practice, which accounts in a large measure for its effective provisions. As a result of this Act, an agreement to arbitrate is made irrevocable; means are provided for selecting arbitrators; and a method provided for entering a judgment upon an award. Chapters II and III demonstrate that these are the essential points.

Statutory arbitrations are mainly resorted to by persons who do not belong to a trade association and have no access to arbitral facilities. The procedure now used in this type of arbitration follows that provided under the Act of 1927. The future of this type depends to a great extent upon the measure of favor with which business men as a whole regard the system. This form of arbitration is not likely to be used extensively, because the advantages of arbitrating under the rules and procedure of trade associations are much greater.

Second, — an examination of the methods and procedure in forty Pennsylvania trade associations reveals that, although all had established systems of arbitration, many of them were not so organized as to permit the systems to function successfully.[13] In many of

11. See Chapter II, supra, pp. 41-49.
12. See Chapter III, supra, pp. 39-73.
13. See Chapter V, supra, pp. 122-125.

these associations the membership was composed of only one group of tradesmen, who rarely entered into contractual relations with one another. A trade association so constituted could not expect its arbitral tribunal to be utilized, particularly where no provision was made for use by non-members. This is a matter for the various trade associations to correct. It is suggested that if tradesmen would organize their associations so as to include members from all branches of the industry, and then adopt effective provisions for arbitration of disputes between those members, trade arbitrations would be more widely used than they are at present. Even better results might be obtained if a method were provided by which non-members could submit their disputes with members to the arbitral tribunal of the association. Pennsylvania trade associations might profit from a study of arbitration systems in some of the New York organizations,[14] — such as the Silk Association of America, the National Wholesale Grocers' Association, the Tanner's Council, etc., as well as those established by some of the English trade bodies.

9. *Arbitration Through Dictatorship.*

An alternative form of arbitration, differing somewhat from either the statutory or the trade type, has recently been employed in certain industries to remedy trade abuses which have increased to such an extent that the welfare of the industry is threatened. Some of the industries which have adopted this method are baseball, motion pictures, theatrical producers, women's wear and garments, and electrical contractors.[15] In each of these industries the more influential members have organized a strong trade association governed by one man, — sometimes referred to as a dictator, — who exercises the powers of a supreme arbiter. In this capacity he determines matters of policy affecting the industry as a whole. This method has apparently been quite successful in curbing abusive practices and in stabilizing industries that previously were in a somewhat chaotic state.[16]

This type has taken another form in the motion picture indus-

14. See Chapter V, supra, pp. 141-148.
15. See Chapter VII, supra, pp. 167-197.
16. See Chapter VII, supra, pp. 197-200.

try — where an elaborate arbitration system has been created.[17] A standard form of contract was adopted covering the leasing of motion picture films. This contract contained an arbitration clause which required the parties to submit disputes to arbitration. To handle these cases, thirty-two Film Boards of Trade, each having an arbitration board, were established in the United States. This system was very successful in eliminating disputes — until declared illegal by the courts because the compulsory element had been provided without the sanction of all parties concerned. It is hoped that a voluntary system may be worked out which will receive legal sanction.

10. *Trade Arbitration - or - Dictatorship?*

Which of these two forms of arbitration seem to enjoy the best prospects for future development? Generalizing from the data offered in Chapters V and VII, it appears that where extensive disorganization and even disintegration of an industry are threatened, and where therefore the drastic sweeping action of the surgeon is needed, the dictator type of arbitration offers the best prospect of success. Where greater care for ethical standards exists, and a more normal rate of growth has occurred, the regular trade association and statutory forms are indicated.

17. See Chapter VII, supra, pp. 176-185.

APPENDIX

APPENDIX I

County	Average Time Involved in Assumpsit Actions	Time Involved Due to Congestion of Trial List
Adams	12 months	1-2 months
Allegheny	18 months	14 months
Armstrong	6-7 months	1¼ months
Beaver	6 months	1½ months
Bedford	6 months	1 month
Berks	3 months	Uncertain
Blair	12 months	1-3 months
Bradford	6-12 months	6 months
Bucks	6-12 months	4-8 months
Butler	7 months	3 months
Cambria	9-12 months	3 months
Cameron	18-24 months	6 months
Carbon	2-3 months	1-2 months
Center	18 months	1 month
Chester	3 months	1 month
Clarion	24 months	6 months
Clearfield	1-3 months	1 month
Clinton	6 months	1½ months
Columbia	15 months	6 months
Crawford	Uncertain	Uncertain
Dauphin	6 months	1 month
Delaware	13 months	9 months
Erie	24 months	18 months
Fayette	10 months	6 months
Franklin	7 months	6 months
Greene	1-18 months	9 months
Huntingdon	7 months	5 months
Indiana	6-24 months	6 months
Juniata	3 months	1½ months
Lackawanna	6 months	3 months
Lancaster	3 months	2 months
Lawrence	12 months	2-3 months
Lehigh	3 months	2 months
Luzerne	18-24 months	18 months
Lycoming	3-4 months	2-3 months
McKean	3-6 months	1½-3 months
Mifflin	12 months	6 months
Monroe	1¼ months	1 month
Montgomery	6 months	2 months
Montour	24 months	12-18 months
Northampton	12-14 months	12 months
Perry	9 months	1 month
Philadelphia	16 months	*
Pike	24 months	12 months
Potter	3-6 months	2 months
Snyder	4 months	1 month
Somerset	3 months	1 month
Union	6-18 months	6 months
Wayne	6 months	3 months
Westmoreland	12 months	3 months

* The Courts of Common Pleas in Philadelphia County are five in number
The Trial List of Common Pleas No. 1 is 10 months in arrears.
The Trial List of Common Pleas No. 2 is 3 months in arrears.
The Trial List of Common Pleas No. 3 is 12 month in arrears.
The Trial List of Common Pleas No. 4 is 12 months in arrears.
The Trial List of Common Pleas No. 5 is 12 months in arrears.

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